PROOF OF SERVICE

I, Helen Abraham, declare that I am over the age of eighteen years and not a party to the within action. I am employed in San Francisco, California and my business address is One Sansome Street, Suite 3400, San Francisco, California. I am readily familiar with the business practice at my place of business for the collection and processing of correspondence for hand delivery by messenger and/or by mailing with the United States Postal Service. On the date set forth below, the following document:

ANSWER TO CIVIL COMPLAINT

was placed for service in a sealed envelope to be delivered by messenger with postage prepaid and addressed to:

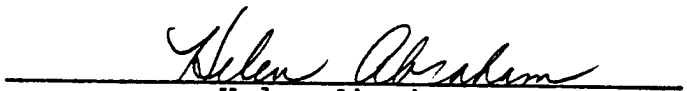
Regional Hearing Clerk
United States Environmental Protection Agency
Region IX, RC-1
75 Hawthorne Street
San Francisco, CA 94105

David M. Jones, Esq.
Office of Regional Counsel RC-2-1
United States Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, CA 94105

and said envelope was hand-delivered by messenger following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 14, 1994, at San Francisco, California.



Helen Abraham

Robert D. Wyatt, Esq.
Eileen M. Nottoli, Esq.
BEVERIDGE & DIAMOND
One Sansome Street
Suite No. 3400
San Francisco, California 94104

Attorneys for Respondent
Catalina Yachts, Inc.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 HAWTHORNE STREET
SAN FRANCISCO, CA 94105

In the matter of:	Docket No. EPCRA 09-94-0015
CATALINA YACHTS, INC.	DECLARATION OF GERARD DOUGLAS IN OPPOSITION TO MOTION FOR ACCELERATED DECISION AND REQUEST FOR HEARING
Respondent	

DECLARATION

I, Gerard Douglas do declare as follows:

1. Since 1976, I have been employed by Catalina Yachts, Inc. ("Catalina"). One of my responsibilities is managing Catalina's compliance with environmental laws and regulations. The following facts are within my personal knowledge and if called as a witness I could competently testify with respect thereto.

2. Catalina designs and constructs moderately priced sail boats at its plant located at 21200 Victory Boulevard, Woodland Hills, California. Catalina is a small family owned

corporation and currently has 255 employees at its Woodland Hills Plant.

3. Resins that contain styrene are among materials used to construct the sail boats. Acetone has historically been the primary cleaning agent used to clean boat parts. Catalina used resins which contained more than 25,000 pounds of styrene in each year from 1988-1992 and used more than 10,000 pounds of acetone in 1988 and 1989.

4. Catalina did not file SARA § 313 Form R reports for styrene in 1988-92 and did not file Form R reports for its use of acetone in 1988-89. The reason Catalina did not file Form R reports is that the Company did not become aware of SARA § 313 Form R reporting requirements until a facility visit by an EPA inspector in November of 1993.

5. There is no evidence that Catalina's delay in filing Form R Reports for acetone and styrene has caused any harm to public health or the environment. There have been no unauthorized releases of either material.

6. Significantly, on September 30, 1994, EPA proposed de-listing acetone as a toxic chemical under SARA § 313. If acetone is delisted as proposed, facilities would not be required to file Form R reports for this material. EPA states in its proposal that it is recommending the delisting because EPA believes that acetone does not meet the listing criteria for SARA § 313. EPA stated in the Federal Register that "acetone cannot reasonably be anticipated to cause '...significant adverse acute human health effects at

concentration levels that are reasonably likely to exist beyond facility site boundaries as a result of continuous, or frequently recurring releases'." 59 Fed. Reg. 49889 (September 30, 1994). A true and correct copy of EPA's proposed delisting is attached hereto as Exhibit A.

7. At all relevant times, Catalina has performed public disclosure and public outreach to the community within which its Woodland Hills plant is located regarding the company's use of styrene and acetone. The following actions were taken:

a. Catalina identified its use of resins containing styrene and its use of acetone in its Business Plan which was filed annually with the local fire department for all years relevant to this action. A copy of the filing made on February 20, 1989 is attached hereto as Exhibit B;

b. Catalina filed annual reports on its air emissions with the South Coast Air Quality Management District. These reports identified the annual emissions of acetone and polyester gel coat and resin. Copies of the 1988 and 1989 reports are attached hereto as Exhibits C and D;

c. Catalina filed a specific report on its styrene emissions with the South Coast Air Quality Management District on October 31, 1991. This report is attached hereto as Exhibit E;

d. The South Coast Air Quality Management District published several newspaper notices in the Los

Angeles Times which identified Catalina as a source of volatile organic emissions. Copies of notices which appeared on January 7, 1988, September 17, 1988, May 24, 1989, February 9, 1990, and April 10,1991 are attached as Exhibit F;

e. Catalina held an open house on April 6 and 7, 1991. Boat owners and community members were invited by signs around the plant. Approximately 1,000 people attended the open house. Many members of the community attended the open house and were given a tour of the plant which fully described operations and the nature of materials used in boat construction. Photographs of the open house are attached hereto as Exhibit G;

f. Catalina has met with the Woodland Hills Chamber of Commerce on several occasions to discuss Catalina's facility operations;

g. Catalina voluntarily initiated a program to find a substitute for acetone to clean boat parts. Significantly, Catalina was the first boat builder to successfully find a substitute for acetone and that success has resulted in Catalina's dramatic decrease in the use of acetone from over 10,000 gallons a year to less than 100 gallons. Since that time, other boat

builders around the country have followed Catalina's initiative by adopting similar programs. A true and correct copy of a letter from our supplier of the substitute confirming our success is attached hereto as Exhibit H.

8. Catalina had a profit of $226,000 based on over $52,000,000 in sales in 1988. From 1989-1993, Catalina Yacht operated at a loss, and the combined losses are almost $4,000,000.

9. Catalina had not been aware of the SARA § 313 reporting obligations until late 1993 when an EPA inspector conducted a facility inspection of the Woodland Hills plant. I do not recall receiving any information from any source on SARA § 313 reporting obligations.

a. To the best of my knowledge, Catalina had not been informed about SARA § 313 by any government agency outreach efforts. I do not recall receiving any mailing from EPA on the requirements of SARA § 313 in the mid-late 1980's. I understand from EPA staff that EPA Region IX used a mailing list based on companies listed in Dun & Bradstreet in the mid to late-1980's to initially inform companies about the reporting requirements of SARA § 313. Catalina was not listed by Dun & Bradstreet at that time.

b. I also had attended during the relevant time frame several workshops on air emissions at the South Coast Air Quality Management District. To the best of my

knowledge no mention was made of SARA § 313 reporting obligations at those workshops.

c. Up until 1988, Catalina prepared all required environmental compliance reports. Since 1988, because of the increased complexity to prepare the expansive state and local reporting requirements and the burden on a small business to prepare these reports, Catalina hired an environmental consultant to prepare environmental compliance reports. The consultant reviewed the operations and did not identify any SARA § 313 reporting requirements.

d. Catalina does not subscribe to the Federal Register and only receives notices of Coast Guard regulations relevant to small water craft.

e. Attached hereto as Exhibits I-J are copies of Material Safety Data Sheets ("MSDSs") for acetone and resins containing styrene used by Catalina. These MSDSs either do not contain a reference to SARA § 313 or contain a statement that the chemical is subject to the SARA § 313 reporting requirements but does not state that the user may be subject to SARA § 313.

10. During the EPA inspection, Catalina fully cooperated with the inspector and provided the inspector access to all relevant records. Once Catalina learned about the SARA § 313 reporting obligations, it took timely action to cause all required reports to be filed.

I declare under penalty of perjury in accordance with the laws of the State of California that the above declaration is true and correct. Executed at Woodland Hills, California this 19th day of October 1994.

DATED: October 19, 1994

By: Gerard Douglas
Gerard Douglas

n:\eh\1400\3400\DEC.DOU

PROOF OF SERVICE

I, Helen Abraham, declare that I am over the age of eighteen years and not a party to the within action. I am employed in San Francisco, California and my business address is One Sansome Street, Suite 3400, San Francisco, California. I am readily familiar with the business practice at my place of business for the collection and processing of correspondence for hand delivery by messenger and/or by mailing with the United States Postal Service. On the date set forth below, the following document:

DECLARATION OF GERARD DOUGLAS IN OPPOSITION TO MOTION FOR ACCELERATED DECISION AND REQUEST FOR HEARING

was placed for service in a sealed envelope to be delivered by messenger with postage prepaid and addressed to:

Regional Hearing Clerk
United States Environmental Protection Agency
Region IX, RC-1
75 Hawthorne Street
San Francisco, CA 94105

David M. Jones, Esq.
Office of Regional Counsel RC-2-1
United States Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, CA 94105

Presiding Officer
United States Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, CA 94105

and said envelope was hand-delivered by messenger following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 19, 1994, at San Francisco, California.

Helen Abraham

Robert D. Wyatt, Esq.
Eileen M. Nottoli, Esq.
BEVERIDGE & DIAMOND
One Sansome Street
Suite No. 3400
San Francisco, California 94104

Attorneys for Respondent
Catalina Yachts, Inc.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 HAWTHORNE STREET
SAN FRANCISCO, CA 94105

In the matter of:	Docket No. EPCRA 09-94-0015
CATALINA YACHTS, INC.	OPPOSITION TO MOTION FOR ACCELERATED DECISION AND REQUEST FOR HEARING

Catalina Yachts, Inc. ("Catalina") responds to the United States Environmental Protection Agency Region 9's ("EPA") Motion for Accelerated Decision as follows. Catalina also requests, for the reasons set forth below, that the court either dismiss this action, determine liability with no civil penalty, or set a hearing as soon as possible to determine an appropriate civil penalty.

FACTS

On June 20, 1994, EPA filed a Complaint and Notice of Opportunity for Hearing ("Complaint") against Catalina for alleged failures to file seven Form R reports for 1988-92. EPA

sought the maximum penalty of $25,000 for each alleged reporting violation for a total of $175,000.

As set forth in the Declaration of Gerard Douglas (referred to hereinafter as "Decl."), Catalina is a small family owned corporation that designs and manufactures moderately priced sail boats. (Decl. ¶ 2.). Its plant is located at 21200 Victory Boulevard in Woodland Hills, California and employs approximately 255 employees. Id.

Catalina has used resins that contain styrene to construct various boat parts. (Decl. ¶ 3.). Between 1988 and 1992, Catalina used over 25,000 pounds of styrene. Id. In 1988-89, Catalina annually used over 10,000 pounds of acetone to clean boat parts. Id. Catalina successfully found a substitute that does not contain acetone. (Decl. ¶ 7.g.). Catalina has been using this substitute since 1990. Id.

Catalina concedes that it did not file SARA § 313 Form R reports for its use of acetone in 1988 and 1989 and for its use of styrene in 1988-92. (Decl. ¶ 4.). Importantly, however, between 1988 and 1993, Catalina had filed numerous reports with government agencies on both its use of resins containing styrene and acetone as well as on its emissions. (Decl. ¶ 7.). Moreover, Catalina reached out to the public to inform the community about its operations and air emissions. Catalina invited the community to an open house of its plant in 1991. (Decl. ¶ 7.e.). Approximately 1,000 people attended the open house. Id. Participants were given a tour of the plant which explained the operations and the use of materials to

manufacture the boats. Id. In addition, Catalina attended meetings with the Chamber of Commerce at which its operations and emissions were discussed. (Decl. 7.f.).

Catalina's annual sales had declined from approximately $53 million to $29 million from 1988 to 1992. Moreover, Catalina has suffered substantial operating losses each year from 1989-93. (Decl. ¶ 8.).

Catalina was not aware of any reporting obligations under Section 313 of the Emergency Planning and Community Right to Know Laws, 42 U.S.C. §§ 11001 et seq. (also known as Title III of the Superfund Amendments and Reauthorization Act or "SARA") until an EPA inspector conducted a facility inspection in late 1993. (Decl. ¶ 4. and 9.). Catalina fully cooperated with the inspector and timely filed the appropriate Form R reports for styrene and acetone for 1988-92 after actual notice of the applicability of the reporting program. (Decl. ¶ 10).

ARGUMENT

In this action, EPA seeks to impose $175,000 in civil penalties for an administrative error. In numerous ways and on several occasions, Catalina has informed the community about Catalina's use of acetone and resins containing styrene. There is no evidence that Catalina's use of such materials caused any harm to human health or the environment.

Catalina has met with EPA at an informal settlement conference to discuss a possible settlement of the Complaint. During that informal settlement conference, EPA informed

Catalina that EPA staff were required to strictly follow the "Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990)" (referred to herein as the "EPA Penalty Policy"). EPA staff informed Catalina that it followed the EPA Penalty Policy in determining that the proposed penalty be $25,000 per violation, the maximum penalty allowed by statute. EPA staff acknowledged that Catalina was cooperative and that Catalina timely acted to file the past Form R reports. While EPA staff was willing to adjust the proposed penalty by 30% as provided under the EPA Penalty Policy, EPA staff informed Catalina that EPA staff had no discretion to further adjust the proposed penalty.

Under the rule set forth in McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317 (D.C.Cir., 1988), the EPA Penalty Policy is a legislative rule. National Family Planning v. Sullivan, 979 F.2d 1106 (D.C.Cir., 1992). McLouth held that two criteria separate a true policy from a legislative rule: a policy statement (i) does not have a "present-day binding effect", that is, it does not "impose any rights and obligations" and (ii) genuinely leaves the agency and its decision-makers free to exercise discretion." McLouth at 1320. As cited by McLouth, "[i]f it appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is -- a binding rule of substantive law" quoting Community Nutrition Institute v. Young, 818 F.2d 943 (D.C.Cir.,

1987)(emphasis in original). Based on the statements by EPA staff at the informal settlement conference that EPA staff has no discretion and must strictly follow the EPA Penalty Policy, the EPA Penalty Policy is a legislative rule under McLouth.

A legislative rule must comply with the notice and comment requirements of the Administrative Procedures Act ("APA"), 5 U.S.C. § 553. The EPA Penalty Policy was not published in the Federal Register for notice and comment and subsequent adoption in accordance with Section 553 of the APA. Lincoln v. Vigil, 113 S.Ct. 2024 (1993). Under the rule in McLouth, the EPA Penalty Policy need not be followed.

RELIEF REQUESTED

Under the facts as set forth above, Catalina requests that the court either dismiss this action, determine liability with an award of no civil penalty, or set a hearing as soon as possible to determine the appropriate civil penalty based on the evidence of Catalina's substantive compliance with the requirements to inform the community of Catalina's use of acetone and styrene and the absence of evidence of harm to human health or the environment.

DATE: October 19, 1994 BEVERIDGE & DIAMOND

By: Eileen M. Nottoli
Eileen M. Nottoli
Attorneys for
CATALINA YACHTS, INC.

PROOF OF SERVICE

I, Helen Abraham, declare that I am over the age of eighteen years and not a party to the within action. I am employed in San Francisco, California and my business address is One Sansome Street, Suite 3400, San Francisco, California. I am readily familiar with the business practice at my place of business for the collection and processing of correspondence for hand delivery by messenger and/or by mailing with the United States Postal Service. On the date set forth below, the following document:

OPPOSITION TO MOTION FOR ACCELERATED DECISION AND REQUEST FOR HEARING

was placed for service in a sealed envelope to be delivered by messenger with postage prepaid and addressed to:

Regional Hearing Clerk
United States Environmental Protection Agency
Region IX, RC-1
75 Hawthorne Street
San Francisco, CA 94105

David M. Jones, Esq.
Office of Regional Counsel RC-2-1
United States Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, CA 94105

Presiding Officer
United States Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, CA 94105

and said envelope was hand-delivered by messenger following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 19, 1994, at San Francisco, California.

Helen Abraham

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9

In re:	Docket No. TSCA-09-94-0015
CATALINA YACHTS, INC.,	
Respondent.	

MOTION TO STRIKE OPPOSITION TO MOTION FOR ACCELERATED DECISION

COMES NOW THE COMPLAINANT, the United States Environmental Protection Agency (EPA), Region 9, by David M. Jones, its attorney of record, pursuant to the authority set forth at 40 C.F.R. § 22.16 and moves the Honorable Spencer T. Nissen, the Presiding Administrative Law Judge in the above-entitled matter, for an Order to strike that portion of Respondent's Opposition To Motion For Accelerated Decision and Request For Hearing which refers to and describes the communications between the parties to this administrative enforcement action during the informal settlement conference held at Respondent's request.

I. Introduction.

On June 20, 1994, EPA, Region 9 commenced the prosecution of this civil administrative enforcement litigation with the issuance of a Complaint and Notice of Opportunity for Hearing ("Complaint") pursuant to the authority set forth in Section 325(c) of the Emergency Planning And Community Right-to-Know Act (EPCRA).
The Complaint consists of seven separate counts. Counts I and II charge Respondent with failure to submit a Form R covering the

usage of acetone for the years 1988 and 1989 in violation of Section 313 of EPCRA [42 U.S.C. § 11023] and 40 C.F.R. Part 372. Counts III through VII charge Respondent with failure to submit a Form R covering usage of styrene for the years 1988, 1989, 1990, 1991 and 1992, also in violation of Section 313 of EPCRA and 40 C.F.R. Part 372.

Respondent's Answer To Civil Complaint ("Answer") was filed with the Regional Hearing Clerk, Region 9, on July 14, 1994. Respondent's response to each of the seven counts was a denial based on "continuing to review its records." There is no indication that Respondent has completed the review of "its records" to date.

On October 4, 1994, Complainant filed a Motion For Accelerated Decision as to liability pursuant to 40 C.F.R. §§ 22.16(a) and 22.20(a). Complainant contends that there are no material facts with respect to liability to be decided by a hearing. Respondent's response to the Motion For Accelerated Decision captioned Opposition To Motion For Accelerated Decision And Request For Hearing ("Opposition To Motion") dated October 19, 1994, gave rise to the Motion To Strike Opposition To Motion For Accelerated Decision And Request For Hearing.

II. Complainant's Motion Is To Only Strike A Part of the Opposition To Motion.

By its motion Complainant would have the Presiding Administrative Law Judge strike only that portion of Respondent's Opposition To Motion wherein Respondent refers to and describes the communications between the parties to this administrative

enforcement action which took place during the informal settlement conference held at Respondent's request.

More specifically, Complainant is referring to the paragraphs that begin at the bottom of page 3 of Respondent's Opposition To Motion and continues to the middle of page 4. The discussion of the settlement conference resumes and concludes on the top of page 5.

III. Motion To Strike Is Appropriate.

Although Motions to Strike are not always favored by administrative tribunals and the Courts and should be granted only when the matters to be stricken are clearly inadmissible or unrelated to the controversy,[1] the recognized function of this Motion is to "expedite the administration of justice".[2] "Weeding out legally insufficient defenses at an early stage" in the proceeding can prove to be "extremely valuable to all concerned"--including this administrative tribunal--by avoiding "the needless expenditure of time and money in litigating issues which can be foreseen to have no bearing on the outcome".[3] This is especially true for defenses which would substantially complicate the discovery proceedings. In such an action, a hearing is

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[1] 2A Moore's Federal Practice , Section 12.21 (MB 2nd ed. 1987)

[2] *American Machine & Metals, Inc. v. De Bothezat Impeller Co. Inc.*(SD NY 1984), 8 FRD 306, at 308

[3] *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*(DRI 1976), 418 F.Supp. 798, at 801

presumptively the settlements themselves) as manifested in Rule 408 rests in the public policy favoring private resolution of disputes and thus avoidance of litigation. (Citations Omitted) Thus, the policy is one designed to increase the likelihood of amicable settlement of dispute prior to a resort to litigation, be it administrative or judicial." [8]

V. The EPCRA ERP Is Not A Legislative Rule.

Respondent's reference to and description of the communications which took place between the parties during a settlement conference are cited in its Opposition To Motion in support of the "legislative rule" concept set forth in Section 553 of the Administrative Procedure Act [5 U.S.C. § 553]. Respondent's cite *McLouth Steel Products Corp. v. Thomas* (D.C. Cir. 1988), 838 F.2d 1317 in support of their argument.

The Court in *McLouth* points out that a policy statement 1) does not have "a present-day binding effect," and 2) "genuinely leaves the agency [here EPA] and its decisionmakers free to exercise discretion."[9] Respondent's attempt to use their description of the communications exchanged at the settlement conference to show that the representatives of Complainant were not free to exercise discretion fails because the Opposition to Motion shows that Complainant's representatives were willing to exercise discretion by a thirty percent adjustment. The purported adjustment of the

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[8] *Holland Livestock Ranch And John J. Casey* (1981), 88 I.D. 275, at 290, 1981 I.D. Lexis 21

[9] *McLouth Steel Prods. Corp. v. Thomas* at

civil penalty offered by Complainant's representatives is found in the last sentence beginning at line 10 of the paragraph that begins on page 3 and ends on page 4. The sentence cited is a direct contradiction of the sentence beginning on line 27 of page 3 and ending on page 4 of the Opposition To Motion and the sentence beginning on line 1 and ending on line 4 of page 5.

Complainant contends that *McLouth* is not applicable to the circumstances set forth in Respondent's Opposition To Motion. Complainant further contends that Respondent's argument that the Enforcement Response Policy For Section 313 is a legislative rule under 5 U.S.C. § 553 is in error for the reasons stated herein above. The reference to and description of communications exchanged at a settlement conference, even if accurately stated, is not justified by Respondent's argument that the Enforcement Response Policy For Section 313 is a legislative rule.

V. Conclusion.

For the reasons stated herein above, that is the reference to and description of communications which took place during compromise negotiations, Complainant urges the Presiding Administrative Law Judge to strike the portion of the Opposition To Motion identified herein which offends the policy underlying Rule 408 of the Federal Rules of Evidence.

Dated: November 10, 1994

Respectfully submitted,

Counsel for Complainant

CERTIFICATE OF SERVICE

I hereby certify that the original copy of the foregoing Motion to Strike Opposition To Motion For Accelerated Decision was filed with the Regional Hearing Clerk, United States Environmental Protection Agency, Region 9 and that a copy was sent by First Class Mail to:

Spencer T. Nissen
Administrative Law Judge
Office of Administrative Law Judges
United States Environmental Protection Agency
401 M Street, Room 3706 (A-110)
Washington, D. C. 20460

and to:

Robert D. Wyatt, Esquire
Eileen M. Nottoli, Esquire
BEVERIDGE & DIAMOND
One Sansome Street
San Francisco, CA 94104

11/10/94
Date

Laurel Nichols
Office of Regional Counsel
U. S. Environmental Protection
Agency, Region 9

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Catalina Yachts, Inc.,	)	**Docket No. EPCRA-09-94-0015**
	)	
Respondent	)	

ORDER GRANTING MOTION FOR ACCELERATED DECISION AS TO LIABILITY AND DENYING MOTION TO STRIKE

The complaint in this proceeding under Section 325 of the Emergency Planning and Community Right-To-Know Act (42 U.S.C. § 11045) (EPCRA), issued on June 17, 1994, charged Respondent, Catalina Yachts, Inc., with failing to file Toxic Chemical Release Inventory Reporting Forms (Form Rs) for acetone for the years 1988 and 1989 and for styrene for the years 1988-1992. For these alleged violations, it was proposed to assess Catalina the maximum penalty permitted by the Act, $25,000 per violation, for a total of $175,000.

Catalina answered, admitting that it was the owner or operator of a facility as defined in EPCRA § 329, which is in SIC Code 3732, and that it employed more than ten "full-time employees." Catalina asserted, however, that it was reviewing its records and unable, at the present time, to respond to the failures to file Toxic Chemical Inventory Reporting Forms as alleged in the complaint. Catalina denied the alleged violations, requested a hearing to contest the

violations alleged in the complaint and the penalties proposed therefor.

On October 4, 1994, Complainant filed a motion for an accelerated decision as to liability, alleging that there was no genuine issue as to material fact and that Complainant was entitled to judgment as a matter of law. Complainant argued that Catalina's answer does not clearly and directly deny any [material] factual allegation of the complaint as required by Rule 22.15(b) of the Consolidated Rules of Practice (40 CFR Part 22) and, therefore, constituted an admission thereof in accordance with Rule 22.15(d).

Catalina responded to the motion under date of October 19, 1994. Catalina admitted that it did not file "Form R" reports for its use of acetone in the years 1988 and 1989 and for its use of styrene in the years 1988-1992. Catalina alleged, however, certain mitigating circumstances, including that it had filed numerous reports with government agencies on its use of resins containing styrene and acetone as well as on its emissions. Additionally, Catalina alleged that it had discontinued the use of acetone, that its sales had declined from approximately $53 million to $29 million between 1988 and 1992, that it had suffered substantial operating losses each year from 1989 to 1993, that it was unaware of its EPCRA reporting obligations until the EPA inspection, that it had cooperated fully with the inspector and promptly filed Form R reports after actual notice of the applicability of the reporting program.

Finally, Catalina alleged that during settlement negotiations, it was informed by EPA representatives that they were required to strictly adhere to the Enforcement Response Policy (ERP) for Section 313 of EPCRA (1992) and that beyond a 30 percent (downward) adjustment, EPA staff had no discretion to further adjust the penalty. Catalina points out that to treat the ERP as binding makes it a "legislative rule," which, not having been promulgated in accordance with the Administrative Procedure Act, is invalid. Catalina requested that the ALJ either dismiss this action, determine liability without awarding any civil penalty, or schedule a hearing as soon as possible to determine an appropriate penalty based on all the evidence.

On November 10, 1994, Complainant filed a motion to strike that portion of Catalina's opposition to its motion for accelerated decision which referred to communications between the parties at a settlement conference, contending (1) that statements made during the course of settlement discussions are not admissible under Federal Evidence Rule 403;[1/] and (2) that the ERP is not a legislative rule, because Complainant was willing to adjust the penalty by 30 percent. Catalina has opposed the motion to strike, asserting that its opposition to Complainant's motion for an accelerated decision was not a pleading within the meaning of FRCP Rule 12(f) and, thus a motion to strike is not appropriate, and,

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[1/] Consolidated Rule 22.22 provides ". . . that evidence relating to settlement which would be excluded under Rule 403 of the Federal Rules of Evidence is not admissible."

that, in any event, Federal Evidence Rule 403 does not require the exclusion of evidence "otherwise discoverable" merely because it was presented in the course of settlement negotiations. Catalina argues that, because the evidence at issue is offered to prove that Complainant treats the ERP as binding, rather than to prove invalidity of the claim or the amount thereof, the evidence is within the mentioned exception and that the motion to strike should be denied.

D I S C U S S I O N

Catalina having conceded that it failed to file "Form Rs" as alleged in the complaint, Complainant's motion for an accelerated decision as to liability will be granted.

The motion to strike in part Catalina's opposition to Complainant's motion for an accelerated decision will be denied.[2/] There can be no doubt that, if, in fact, Complainant treats the ERP as binding, the ERP would be a "legislative rule" and invalid, because it was not promulgated in accordance with the APA.[3/] Complainant's argument that the ERP is not a legislative rule, because Complainant was willing to consider an adjustment in the

---

[2/] Consolidated Rule 22.16 concerning motions does not limit the subject matter of motions in any manner and the fact that FRCP Rule 12(f) confines "motions to strike" to pleadings is not controlling.

[3/] See United States Telephone Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir. 1994). See also Pacific Refining Company, EPCRA Appeal No. 94-1 (EAB, December 6, 1994) (dissenting opinion, McCallum, J).

proposed penalty of 30 percent, is wide of the mark because the adjustment is well within the contemplation of the ERP.[4/] Therefore, consideration of such an adjustment does not refute Catalina's contention that the ERP is a legislative rule.[5/] While there is nothing to preclude Complainant from taking patently illegal positions during settlement discussions, such tactics make a mockery of "good faith" negotiation.

Although statement's of Complainant's representatives during settlement discussions are not admissible, statements with respect to the binding nature of the ERP may be "otherwise discoverable" within the meaning of Federal Evidence Rule 408.[6/] It is unnecessary to decide at this time, however, whether such statements are otherwise discoverable, because no motion for discovery is before me. The fact that the exception exists and may be applicable is considered a sufficient reason for denying the motion to strike.

[4/] For example, the ERP under "attitude" authorizes an adjustment of up to 15 percent each for "cooperation" and "compliance" (Id. 18). Moreover, acetone has recently been proposed for delisting (59 Fed. Reg. 49888, September 30, 1994). If the proposal were finalized during the pendency of this action, Catalina would be entitled to a 25 percent downward adjustment in the proposed penalty for the acetone violations under the ERP.

[5/] The ERP is not, of course, binding on the ALJ (Consolidated Rule 22.27(b)).

[6/] See, e.g., Morse/Diesel, Inc. v. Fidelity and Deposit Company of Maryland, 122 F.R.D. 447 (S.D.N.Y. 1988) (requirement for a particularized showing that information sought, claimed to be protected by Federal Evidence Rule 408, will lead to discovery of other admissible evidence).

O R D E R

1. Complainant's motion for an accelerated decision as to liability is granted.

2. Complainant's motion to strike is denied.

3. The amount of the penalty remains at issue and will be decided after a hearing, if a hearing is necessary.

4. Absent a settlement of this matter, the parties will, on or before March 10, 1995, furnish to the other party, the Regional Hearing Clerk, and the undersigned lists of proposed witnesses, summaries of their expected testimony and a copy of each document or exhibit proposed to be offered in evidence. After receipt of the parties' submittals in accordance with this order, I will be in telephonic contact with counsel for the purpose of establishing a location and a mutually agreeable date for the hearing.

Dated this 10th day of January 1995.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER GRANTING MOTION FOR ACCELERATED DECISION AS TO LIABILITY AND DENYING MOTION TO STRIKE**, dated January 10, 1995, in re: Catalina Yachts, Inc., Dkt. No. EPCRA-09-94-0015, was mailed to the Regional Hearing Clerk, Reg. IX, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: January 10, 1995

ADDRESSEES:

Robert D. Wyatt, Esq.
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Mr. Steven Armsey
Regional Hearing Clerk
U.S. EPA, Region IX
75 Hawthorne Street
San Francisco, CA 94105

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Catalina Yachts, Inc.,	)	**Docket Nos. EPCRA-09-94-0015**
	)	
Respondent	)	

NOTICE OF HEARING

Notice is given that a hearing on the captioned proceeding under Section 325 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11045 (Supp. IV 1986), will be held in San Francisco, California, commencing at 9:30 a.m. on Tuesday, May 14, 1996.

A pre-hearing conference will immediately precede the hearing at the same time and place.

The Regional Hearing Clerk is directed to make arrangements for reporting services and for a suitable hearing room and to inform the parties and the undersigned of its location.

Dated this 28th day of February 1996.

Spencer T. Nissen
Administrative Law Judge

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Catalina Yachts, Inc.,	)	**Docket Nos. EPCRA-09-94-0015**
	)	
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Spencer T. Nissen
Administrative Law Judge

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Catalina Yachts, Inc.,	)	**Docket No. EPCRA-09-94-0015**
	)	
Respondent	)	

O R D E R

Counsel for Complainant having by motion, dated February 29, 1996, requested certain financial documents from Respondent which will assist Complainant in meeting its burden of proof with respect to the appropriateness of the civil penalty, and good cause having been shown, Respondent shall provide Complainant with copies of its federal income tax returns for the most recent five-year period on or before April 12, 1996.

Dated this 15th day of March 1996.

Spencer T. Nissen
Administrative Law Judge

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Catalina Yachts, Inc.,	)	**Docket No. EPCRA-09-94-0015**
	)	
Respondent	)	

NOTICE OF CANCELLATION OF HEARING

Counsel for Complainant having by motion, dated June 5, 1996, requested leave to continue the hearing on the captioned matter due to unavailability of Complainant's main witness, the hearing scheduled for July 23, 1996, is canceled. The hearing will be rescheduled at a later date.

Dated this 18th day of June 1996.

Spencer T. Nissen
Administrative Law Judge

Rave

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CATALINA YACHTS, INC.,

Appellant,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Appellee.

CV 99-07357 GHK (VAPx)

MEMORANDUM AND ORDER

This matter comes before the court on appeal from the United States Environmental Protection Agency's ("EPA") Environmental Appeals Board ("EAB") decision of In re Catalina Yachts, Inc., 29 Envtl. L. Rep. 41093 (EPCRA Appeal, March 24, 1999). The court has fully considered the briefs and papers pertaining to this matter. This motion is appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7.11. We rule as follows:

90-11-6-05631

II. BACKGROUND

Appellant Catalina Yachts, Inc. ("Catalina") is a California corporation which manufactures recreational sail boats. On June 20, 1994, the EPA, Region 9, filed an administrative complaint against Catalina seeking $175,000 in civil penalties for Catalina's failure to timely file seven "Form Rs" with the EPA for its use of styrene and acetone. Section 313 of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. § 11023, requires facilities that manufacture, process, or otherwise use certain chemicals in quantities exceeding the established thresholds to submit a Toxic Chemical Release Inventory Form ("Form R") to the EPA. Catalina concedes that it did not file the required forms within the required time period.

On January 27, 1997, an EPA Administrative Law Judge ("ALJ") assessed a penalty of $39,792 against Catalina. This penalty was assessed by taking the EPA's requested amount and reducing it by various factors.

The EPA and Catalina appealed the ALJ's decision to the EAB. The EAB reviewed the ALJ's determination and concluded, on March 24, 1999, that a $69,000 adjustment, as a factor of Catalina's environmentally beneficial measures, was improper, and assessed a final penalty of $108,792 against Catalina (the ALJ's decision was affirmed in every other regard). Catalina, following dismissal of its motion for reconsideration, appeals from the EAB's final decision. We have jurisdiction pursuant to 42 U.S.C. § 11045(f)(1).

II. STANDARD OF REVIEW

EPCRA provides that, "[a]ny person against whom a civil penalty is assessed under this section may obtain review thereof in the appropriate district court of the United States . . . ." 42 U.S.C. § 11045(f)(1). However, EPCRA does not specify the appropriate standard of review. Accordingly, we look to the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq. See Hopi Tribe v. Navajo Tribe, 46 F.3d 908, 914 (9th Cir. 1995). Under the APA, we review the EAB's decision to determine whether it was, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard of review "is narrow and a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

Moreover, insofar as this matter concerns the EPA's authority to establish sanctions, this determination is a "matter of agency policy and discretion." Robinson v. United States, 718 F.2d 336, 339 (10th Cir. 1983). Accordingly, we may not overturn the EPA's choice of sanction unless it is unwarranted in law or unjustified in fact. Spencer Livestock Comm'n v. Department of Agric., 841 F.2d 1451, 1456 (9th Cir. 1988) (citing Butz v. Glover Livestock Comm'n Co., Inc., 411 U.S. 182, 185-86 (1973); Blackfoot Livestock Comm'n v. Department of Agric., 810 F.2d 916, 922 (9th Cir. 1987)).

III. THE EPCRA FRAMEWORK

The parties have limited this appeal to the propriety of the EAB's penalty assessment under EPCRA with respect to Catalina's claimed right to have its environmentally beneficial measures considered as an offset of its assessed penalty. EPCRA section 325 provides that (for reporting violations), "[a]ny person (other than a government entity) who violates any requirement of section 11022 or 11023 of this title shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation." 42 U.S.C. § 11045(c)(1). No more guidance is provided under this subsection as to how to fashion an appropriate penalty.

Lacking statutory directives regarding the assessment of EPCRA reporting violation penalties, the EPA has adopted, as guidance, the penalty assessment factors set forth in 15 U.S.C. § 2615(a)(2)(B). This statute provides:

> In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

Id. The EPA has also adopted its own penalty assessment methodology under the Enforcement Response Policy ("ERP"), based on the penalty factors applicable to other violations of EPCRA. The ERP establishes a two-step process for calculating penalties: first, a gravity based penalty is established reflecting the characteristics of the violation (utilizing a penalty matrix); second, the gravity based penalty is adjusted upwards or downwards, taking into account factors related to the violator (e.g. voluntary disclosure of the violation, prior

violation history, whether the chemical has been de-listed subsequent to the violation, the violator's attitude, ability to pay, and other matters as justice may require). With respect to the "other matters" factor, the ERP states, "the Agency will consider other issues that might arise, on a case-by-case basis, and at Regional discretion, which should be considered in assessing penalties." ERP at 18. However, "[u]se of this reduction is expected to be rare and the circumstances justifying its use must be thoroughly documented in the case file." Id.

Procedurally, EPA's assessment of an administrative penalty is governed by the Agency's Consolidated Rules of Practice, 40 C.F.R. Part 22. Under those rules, an action is initially assigned to an ALJ to render an initial decision both on liability and penalty. This initial decision may then be appealed by the parties, or may be reviewed by the EAB sua sponte, within a fixed amount of time. The EAB may assess a penalty that is higher or lower than the amount recommended to be assessed by the ALJ. However, the EAB's rules of decision have held, "[w]here a penalty assessment is within the range of penalties approved by the applicable penalty policy, 'the Board will not substitute its judgment for that of the Presiding Officer absent a showing that the Presiding Officer has committed an abuse of discretion or a clear error in assessing the penalty.'" In re Spang & Co., 6 E.A.D. 226, 1995 WL 646518, *13 (EPCRA Appeal, Oct. 20, 1995) (citing In re Pacific Refining Co., 5 E.A.D. EPCRA Appeal No. 94-1, Slip Op. at 8 (E.A.B. 1994)).

IV. THE EAB'S PENALTY ASSESSMENT

In its complaint, the EPA requested a $175,000 penalty against Catalina (reflecting the maximum $25,000 EPCRA penalty for Catalina's seven reporting violations). The EAB ultimately imposed a $108,792 penalty, less than the maximum allowable by law, after determining that the ALJ's assessed penalty of $39,792 was clear error.

Catalina argues, however, that the EAB's final penalty determination was an abuse of discretion as it refused to consider Catalina's environmentally beneficial measures under the "other matters as justice may require" rubric.

The scope of our review is not to determine whether Catalina's interpretation of the language in 15 U.S.C. § 2615, which the EAB has adopted as "policy," is the better one, but rather to determine, at most, whether EPA's reading is reasonable and consistent with the statute. See e.g. Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 (1984) ("if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.") (footnote omitted); United States v. Larionoff, 431 U.S. 864, 872 (1977) (court is to give controlling weight to an agency's interpretation "'unless it is plainly erroneous or inconsistent with the regulation.'") (citing Bowles v. Seminole Rock Co., 325 U.S. 410, 414 (1945)). See also National Ass'n of Regulatory Utility Comm'rs v. F.C.C., 746 F.2d 1492, 1502 (D.C. Cir. 1984).

EPA interprets the "other matters as justice may require" language of § 2615 to mean that other factors (or at least environmentally beneficial projects) should not be considered unless

the assessed penalty is otherwise manifestly unjust. We find this interpretation to be reasonable and consistent with the statute's overall purpose, especially in light of EPA's other penalty assessment declarations which indicate EPA's desire to use this factor narrowly, and only in rare circumstances.[1]

V. **DEPARTURE FROM PRECEDENT**

A federal agency is "not absolutely bound by its prior determinations, but rather may adjust its policies and rulings in light of experience: '[c]umulative experience' begets understanding and insight by which judgments . . . are validated or qualified or invalidated." Montana Power Co. v. EPA, 608 F.2d 334, 347 (9th Cir. 1979) (citing NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 349 (1953)). But while an agency may announce new principles in an adjudicatory proceeding, it "may not depart, sub silentio, from its usual rules of decision to reach a different, unexplained result in a single case." NLRB v. Silver Bay Local Union No. 962, 498 F.2d 26, 29 (9th Cir. 1974) (citations omitted).

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[1] Catalina's argument that the EAB's interpretation has wholly read the "justice" factor out of the "controlling statutory language," (Appellant Br. at 11), is more a matter of semantics than anything else. First, this language is not part of the controlling statute, but rather is derived from another environmental statute, not presently applicable, which the EPA has adopted as guidance, and thus the EPA is entitled to greater deference in its interpretation of this language. Second, the EAB's framework still requires consideration of the "justice" factor, however, it is simply not utilized if the assessed penalty is not otherwise unjust. Finally, Catalina is not quite correct when it asserts that the EAB failed to consider its environmentally beneficial projects at all. Despite its ruling in the case, the EAB did actually consider these projects, but was not swayed by them. See In re Catalina Yachts, Inc., Slip. Op. at 23 n. 23.

Catalina contends that the EAB abused its discretion by departing from its prior decision of In re Spang & Co., 6 E.A.D. 226, 1995 WL 546518, *13 (EPA Oct. 20, 1995). However, our reading of Spang leads us to the conclusion that, although Spang is subject to a certain degree of ambiguity, the EAB's determination in the present case is not an unexplained departure from Spang. In Spang, the EAB wrote:

> As a matter of policy, the Agency obviously looks favorably upon the undertaking of a project which benefits the environment and which goes beyond the requirements of environmental laws. By considering such behavior in a penalty assessment proceeding the Agency can provide an incentive for companies to engage in environmentally beneficial activities. Nevertheless, sight must not be lost of the fact that initial compliance with the law is the primary objective of the Agency's enforcement efforts and that penalties play an important deterrent role in those efforts. Therefore, the amount of credit which is allowable for environmentally beneficial projects must be tempered with the knowledge that a violation has taken place. Thus, to strike the proper balance between these conflicting forces, we are of the view that the evidence of environmental good deeds must be clear and unequivocal, and the circumstances must be such that a reasonable person would easily agree that not giving some form of credit would be a manifest injustice. This formulation for giving due credit for environmental good deeds holds faith to the underlying principle of the justice factor, which is essentially to operate as a safety mechanism when necessary to prevent an injustice. It further suggests that use of the justice factor should be far from routine, since application of the other adjustment factors normally produces a penalty that is fair and just.

Id. at *15. This language provides that the "justice" factor should only be applied when not giving someone credit would be a manifest injustice, and that application of this factor should be far from routine because the application of the other adjustments normally produces a penalty that is fair and just. Although the ultimate decision in Spang was to remand the case to the ALJ for consideration of the "justice" factor, we cannot say that the EAB's decision here

was unreasonable, unsubstantiated, or anything more than a clarification, or refinement, of the standard set forth in Spang.[2]

Moreover, in light of the EAB's holding regarding the proper application of the "justice" factor, it was not an abuse of discretion, or contrary to law, for the EAB to have determined that the ALJ's decision was clear error. The ALJ's decision failed to consider EPA policy and the language in Spang discussing the restrictive use of the "justice" factor.

Finally, as the EPA's Consolidated Rules of Practice, 40 C.F.R. Part 22, make it clear that the EAB may modify or increase penalties, we find that it was not an abuse of discretion for the EAB to assess Catalina's final penalty instead of remanding the case to the ALJ for further consideration.

VI. DISPOSITION

The decision of the Environmental Appeals Board is **AFFIRMED**.

IT IS SO ORDERED.

DATED: February 18, 2000

George H. King
United States District Judge

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[2] Nothing in In re Bollman Hat Co., 29 Envtl. L. Rep. 41083 (EPCRA Appeal, Feb. 11, 1999), or In the Matter of F.C. Haab Co., Inc., 12 EPA Envtl. L. Rep. 375 (ALJ June 30, 1998), leads us to alter our result.

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In re:	)	
CATALINA YACHTS, INC.,	)	EPCRA Appeal No. 98-(2)
	)	
Appellee.	)	**REPLY MEMORANDUM OPPOSING**
EPCRA No. EPCRA-09-94-0015	)	**CATALINA YACHTS, INC.'S**
	)	**NOTICE OF APPEAL**

INTRODUCTION

On March 26, 1998, the United States Environmental Protection Agency ("EPA") appealed the amount of the penalty awarded in the Initial Decision filed February 6, 1998 ("Decision"), because Administrative Law Judge Nissen improperly reduced the initial gravity-based penalty of $160,774 by about 75% to award a penalty of only $39,974.

Catalina Yachts, Inc. ("Catalina") also filed a Notice Of Appeal and Supporting Brief ("Memorandum")[1] on March 26, 1998, contending that Administrative Law Judge (ALJ) Nissen erred in awarding any penalty. Catalina asserts that the ALJ erred by: (1) adhering rigidly to the EPCRA Enforcement Response Policy (ERP); (2) not taking into full account the relevant statutory penalty factors; and (3) providing insufficient credit for Catalina's environmentally beneficial projects. In this reply

[1] Catalina failed to file alternative findings of fact or conclusions of law, or any proposed order, as specified in 40 C.F.R. § 22.30(a)(1).

brief, EPA asserts that the ALJ did not adhere rigidly to the ERP and did fully consider the relevant statutory penalty factors in assessing an initial gravity-based penalty. The Memorandum in Support of EPA's Notice of Appeal adequately rebuts Catalina's third contention involving the proper consideration of environmentally beneficial projects, therefore, EPA does not reiterate in detail here why the ALJ erred in reducing the penalty based on "other factors as justice may require."

Catalina contends that it was clear error and/or an abuse of discretion for Judge Nissen to use the EPCRA ERP[2] matrix to calculate the gravity-based penalty. Catalina cites *In the Matter of Hall Signs, Inc.*, Docket No. 5-EPCRA-96-026 (ALJ Pearlstein, Oct. 30, 1997) ("*Hall*") to support its argument, however, Catalina failed to note that EPA has appealed Judge Pearlstein's decision in *Hall*. EPCRA Appeal No. 97-6 (filed Jan. 7, 1998). Relying heavily on *Hall*, Catalina now asserts (for the first time throughout these lengthy proceedings) that: 1) the circumstance level in the ERP matrix should be halved because Catalina sent chemical information to local agencies and

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[2] Enforcement Response Policy for Section 313 Of The Emergency Planning And Community Right-To-Know Act (1986), dated August 10, 1992 ("EPCRA ERP").

conducted community outreach; 2) the extent level should be based on the Small Business Administration guidelines; and 3) the penalty reduction for delisted chemicals should be 80% rather than 25%. Catalina calculates a gravity-based penalty (prior to adjustments) of $13,500, about 10% of the gravity calculated by Judge Nissen.

Second, Catalina asserts that Judge Nissen erred by not reducing the $13,500 penalty by an additional 25% for the absence of prior violations and 25% for its lack of culpability. The remaining penalty would have been $252.13. That penalty was still too high for Catalina, and it wraps up by urging the Board to allow credit for all of its expenditures and profit losses on claimed environmentally beneficial projects, about $309,000.

In accordance with 40 C.F.R. § 22.30(a)(2), EPA will limit this Reply memorandum to the scope of the arguments raised by Catalina in its Memorandum.

ARGUMENT

A. The ALJ's Initial Gravity-Based Penalty Should Not Be Overturned

1. Judge Nissen Did Not Commit Clear Error of Abuse His Discretion By Relying On The EPCRA ERP's Gravity Matrix.

Catalina asserts that the EPCRA ERP is not a promulgated rule that Judge Nissen was bound to follow. Memorandum, p. 2. EPA has never argued otherwise. To the extent that Catalina may be implying that an ALJ is prohibited in any case from following the ERP without abusing his or her discretion, that assertion is plainly wrong. As noted in several Board decisions, ALJs may utilize Agency penalty policies in determining an appropriate civil penalty amount. *In Re: DIC Americas, Inc.*, 5 E.A.D. 184 (EAB 1995). Agency regulations *require* that the ALJs consider such penalty guidelines. 40 C.F.R. §22.27(b). The Board recently issued a thorough discussion of the role that penalty policies similar to the EPCRA ERP play in administrative penalty decisions:

> We are not persuaded that the complainant, having used a penalty policy in formulating a proposed penalty, must offer evidentiary support for each and every factual proposition that is either recited in the policy or implicit in or underlying the policy, in the absence of either a specific challenge to the policy by a respondent or a specific request for such support from the Presiding Officer.

In Re: Employers Insurance of Wausau and Group Eight Technology, Inc., 6 E.A.D. 735, 760 (EAB 1997) ("*Wausau*"). Further, the

Board explicitly held that an ALJ has discretion to rely on the ERP to set an appropriate penalty:

> We readily agree that EPA's adjudicative officers must refrain from treating the PCB Penalty Policy as a rule, and must be prepared 'to re-examine the basic propositions' on which the Policy is based, *McLouth*, 838 F.2d at 1321, in any case **in which those 'basic propositions' are genuinely placed at issue.** We are not persuaded, however, that we should therefore prohibit any reliance on the Penalty Policy by the Agency's enforcement staff, either as a tool for developing penalty proposals or to support the 'appropriateness' of such proposals in individual cases. **Nor are we aware of any basis for concluding that EPA decisionmakers . . . [citation omitted], have applied the PCB Penalty Policy so inflexibly as to belie this Board's repeated assurances that the Agency's Presiding Officers are not 'bound' by the Policy.**

Wausau, at 761 [Emphasis added].

The Board concluded: "[U]se of a written policy to assist in developing penalty proposals should not be presumed to eliminate the exercise of sound professional judgment . . . ." *Id.*[3]

[3] In addition to the broad case law supporting use of EPA's penalty policies, the EAB found nothing inappropriate in applying this particular ERP in the EPCRA § 313 case of *In Re: Pacific Refining Company*, 5 E.A.D. 607 (EAB 1994).

Thus, it was well within Judge Nissen's discretion to rely on the ERP's gravity matrix, and in this case he did not apply the matrix unthinkingly or inflexibly. The Decision states:

> Catalina emphasizes that EPCRA § 325(c) does not mandate that the maximum penalty of $25,000 per violation be assessed and argues, inter alia, that the "nature and circumstances" of the violation compel a substantial reduction in the proposed penalty [citations omitted]. I conclude, however, that prima facie the ERP provides a reasonable basis for determining the gravity based penalty . . .

Decision, p. 30. Here, Judge Nissen properly exercised his discretion to rely on the EPCRA ERP's gravity matrix.

Catalina's appeal also faults Judge Nissen's use of the EPCRA ERP gravity matrix even though Catalina did not genuinely challenge the 'basic propositions' of the ERP's gravity matrix at hearing or in Prehearing Exchange.[4] On this basis alone, EPA urges the Board to refrain from inviting such challenges initially on appeal.[5]

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[4] Catalina argued that no penalty should be assessed because the ERP was not subject to notice and comment. It has not placed in issue the underpinnings of this particular policy.

[5] A contrary ruling will encourage unwieldy, cumbersome proceedings in which litigants could raise a challenge to the 'basic propositions' of a penalty policy initially at very late

(continued...)

In any event, as explained below, Catalina's belated and inartful challenge to the basic propositions of the ERP's gravity matrix is simply without merit.

2. The ALJ's Use of the ERP's Circumstance Level 1 In This Case is Not Clear Error Or an Abuse of Discretion.

Judge Nissen properly exercised his discretion in penalizing Catalina's failures to file Forms R as circumstance Level 1 violations. Catalina argues that the violations were only half as serious because it had provided chemical information to the community and local agencies.[6] Catalina's challenge, either to Judge Nissen's exercise of discretion or to the basic propositions of the ERP matrix, cannot be squared with the Board's recognition in prior decisions that "the value of any data base is substantially diminished if it is incomplete." *DIC Americas, Inc.*, 6 E.A.D. 184, 191. DIC Americas failed to file Forms U required by Section 8 of TSCA. The relevant ERP

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[5](...continued)
stages of lengthy proceedings.

[6] Catalina states: "Based on both the numerous filings with local agencies and the exemplary community outreach, an assessment of 50% (25% each for the filing of satisfactory reports with local agencies and community outreach) for the 'circumstance factor would be more appropriate than the Decision's rigid adherence to EPCRA ERP." Memo, p. 4-5.

contained a penalty matrix similar to the EPCRA ERP gravity matrix. In both, failure to file the required Forms constituted "serious" violations under the ERP's circumstance levels. DIC Americas appealed to this Board to reduce the gravity-based penalty because it had filed information with other agencies. This Board flatly rejected the argument, stating:

> [DIC America] has presented no convincing arguments that the gravity-based penalty derived from the matrix overestimates the seriousness of its violations. As the Region persuasively argued, **the value of any data base is substantially diminished if it is incomplete**. . . [quote from TSCA ERP omitted]. The gravity of such a violation is obviously substantial. Therefore, the presiding officer did not err when she concluded that the failure to file Form U reports was a serious violation.

6 E.A.D, at 191-192 [emphasis added].

The Board affirmed that an ALJ is acting well within his or her discretion to assess circumstance level 1 penalties if the violator failed to file the required forms with EPA, regardless of providing the information to other agencies.

Catalina is not the first litigant to request a penalty reduction because the company provided chemical use information

to local agencies. In *In Re: Apex Microtechnology, Inc.*, EPCRA-09-92-00-07 (May 7, 1993), Judge Frazier held:

> There is no basis in the ERP to support a reduction or mitigation of the penalty because other reports were filed with local authorities . . . **Clearly, Respondent failed to provide EPA with the inventory and disclosure information required by EPCRA.**

Initial Decision, at 17-18 [emphasis added].

Catalina has not presented evidence or arguments to support reducing the "seriousness" of these violations. Judge Nissen correctly determined that Catalina's failures to file Forms R constituted circumstance level 1 violations, and the EPCRA ERP matrix contains a rational system for assigning penalties for violations of such seriousness.

3. The ALJ's Use of The ERP's "Extent" Level A In This Case Is Not Clear Error or An Abuse of Discretion.

The ERP gravity matrix recommends an Extent Level A penalty for Catalina's violations, and Judge Nissen acted within his discretion to agree. Catalina, however, argues that Judge Nissen should have ignored the extent levels in the ERP. Contrary to the mandate in 40 C.F.R. § 22.27(b) and the rulings of the Board, Catalina does not explain the reasons why a deviation from the ERP is appropriate, citing as its only authority Judge

Pearlstein's decision in *Hall*, which is on appeal to the Board. Catalina has taken it one step further by urging that the Board adopt the business size cut points used by the Small Business Administration (SBA). Not only has Catalina failed to point to any flaws in Judge Nissen's use of the ERP's extent level methodology, but it also fails to explain why its proposed SBA approach is more rational.[7] Even if the Board agreed that such an untimely challenge to the ERP's methodology could be entertained first on appeal, Catalina's hastily prepared and incomplete argument should not be allowed to undermine Judge Nissen's fully considered and thorough exercise of discretion concerning the extent level of Catalina's violations.

Judge Nissen had the discretion to find that the extent level 1 penalty was not appropriate on these facts. He was not bound to apply that extent level, but would have to consider the ERP's extent levels and explain any deviation. Instead, he exercised his discretion to follow the ERP's gravity matrix.

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[7] An ALJ does not have authority to invalidate the size of business determinations in the ERP's gravity matrix and substitute them with the structure used by the Small Business Administration. To the extent that Catalina's appeal may be arguing for such an approach, EPA reiterates its position, as noted in its *Hall* appeal brief, that it must be denied.

4. The ALJ's Use In This Case of the ERP's Penalty Reduction For Delisted Chemicals Is Not Clear Error or An Abuse of Discretion.

Catalina further recommends deviating from the EPCRA ERP by factoring into the extent level whether a chemical has been delisted.[8] Without providing any rationale, Catalina asserts that for delisted chemicals the EPCRA ERP should provide a reduction of 80% rather than 25% from the gravity-based penalty. Here again, Catalina did not present any specific facts that would support tripling the reduction recommended in the ERP. Judge Nissen exercised his discretion to agree with EPA and the EPCRA ERP in determining that it was appropriate to subtract 25% from the penalty for acetone because of delisting. That exercise of discretion is not erroneous and results in a penalty that is within the reasonable range of penalties. This Board, therefore, should deny Catalina's appeal on this issue as well. *See Pacific Refining*, at 613.

In summary, EPA urges this Board to restrain litigants from proposing ad hoc, self-serving penalty rationales where, as here, both the Region and the Administrative Law Judge have taken into

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[8] EPA's ERP (at 17-18) treats this as an adjustment factor, rather than, as Catalina suggests, as part of the gravity-based penalty calculation. Catalina does not explain why its alternative approach is more appropriate in this particular case.

account the delisted chemicals issue and determined, consistent with the ERP's treatment of this issue, that the resulting penalty is fair and appropriate for this particular case.

B. Catalina's Request For Further Adjustments To The Gravity-Based Penalty Must Also Be Denied.

Judge Nissen reduced the gravity-based penalty by 30% ($51,000) based on Catalina's "good attitude." EPA's believes the reduction was excessive on the facts of this proceeding, and has appealed the determination. Yet, remarkably, Catalina contends that its $51,000 reduction for good attitude was inadequate.

First, Catalina seeks a 25% reduction because it has not previously violated Section 313 of EPCRA. The EPCRA ERP explains: "The penalty matrix is intended to apply to 'first offenders.'" ERP, p.16. It would be duplicative, therefore, to reduce penalties for first time offenders; Judge Nissen agreed:

> The ERP states that the penalty matrix is intended to apply to 'first offenders' and thus implies that the absence of prior EPCRA violations affords no basis for a downward adjustment in the penalty (citation omitted). This policy is also unexceptionable and no issue can or should be taken therewith. It is concluded, however, that the penalty adjustment factors in TSCA § 16 may not be compartmentalized and that the

> absence of prior violations is a factor to be considered in determining whether a respondent is a good corporate citizen and thus entitled to favorable consideration as to other aspects of the penalty policy.

Decision, p.33. This Board, likewise, should refrain from rewarding Catalina further.

Second, Catalina contends it had no knowledge of the requirement to file Forms R and that Judge Nissen should have reduced the penalty by 25% for its lack of "culpability." This contention has been raised and rejected repeatedly. *See, e.g., Apex Microtechnology*, at 18 ("Although Respondent's witnesses testified that Apex was unaware of the reporting requirements under Section 313 of EPCRA, that does not provide a basis upon which to reduce the penalty.").

Here, Judge Nissen followed Judge Frazier's correct and common sense approach, stating:

> The ERP further states that lack of knowledge does not reduce culpability since the Agency has no intention of encouraging ignorance of EPCRA and its requirements and because the statute only requires facilities to report information which is readily available. The policies expressed in these statements are unexceptional. . . . [S]uch facts are part of the totality of circumstances with respect to the violator and for consideration as

> mitigation of an otherwise harsh penalty.

Decision, p. 31. Denying Catalina's request for a further reduction of the gravity-based penalty is rational and appropriate.

Third, and finally, Catalina argues that Judge Nissen erred by only awarding Catalina a 30% credit for its expenditures on other environmentally related projects. Memo, p. 8. As noted more fully in EPA's appeal brief in this matter, EPA considers any credit for such projects contrary to the standard established by this Board in *In Re: Spang & Company*, 6 E.A.D. 226 (EAB 1995). Catalina's principal argument is that Judge Nissen erred when he did not award 100% credit for expenditures relating to acetone substitution and 70% credit for other projects. For authority, Catalina states: "By contrast, the EAB in *Spang* would have allowed a penalty reduction of 71%." Memo, p.8. Counsel for Catalina misreads *Spang*. The Board in *Spang* did not "allow a penalty reduction of 71%." Rather, it remanded the case for Judge Nissen to determine the correct reduction, if any. The Board in *Spang* was reviewing the fact that Judge Nissen had reduced the gravity-based penalty of $193,000 to $50,000 - a total of 71%. Judge Nissen incorrectly used EPA's Supplemental

Environmental Project (SEP) policy to justify the reduction. The Board never opined that the magnitude of the penalty reduction was warranted, but merely stated:

> We are remanding this penalty assessment to the presiding officer to reexamine what reductions, **if any**, should be made to the $173,700 penalty based upon Spang's ten projects. This determination should be made without regard to the SEP policy, and any reductions should be justified solely on the basis of the 'other factors as justice may require' adjustment factor.

Spang, 6 E.A.D. at 245 [emphasis added].

The Board remanded, but did not express any opinion on the size of the reduction that would be "allowed." As EPA explained in its appeal, Catalina is not entitled to any penalty credit for its expenditures because it has not presented clear and unequivocal evidence of the expenditures or that manifest injustice would result absent credit.

CONCLUSION

For the reasons set forth herein, EPA respectfully requests this Board to deny the Notice of Appeal filed by Catalina Yachts.

Respectfully Submitted,

_____

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CERTIFICATE OF SERVICE

I hereby certify that the original copy of the foregoing Reply Memorandum Opposing Catalina Yacht's, Inc.'s Notice of Appeal were filed with the Clerk of the Environmental Appeals Board and sent to counsel for Respondent by First Class Mail addressed as follows:

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ENVIRONMENTAL APPEALS BOARD

In the Matter of Catalina Yachts, Inc.	EPCRA Appeal No. 98-(2)
Docket No. EPCRA-09-94-0015	CATALINA REPLY TO EPA'S NOTICE OF APPEAL

I. Preliminary Statement.

The sole issue in this matter is the appropriate penalty assessment arising under violations of EPCRA § 313 for a company that engaged in multiple, meaningful community outreach programs, satisfied all local and state reporting requirements, was an industry leader in reducing emissions of toxic chemicals, voluntarily engaged in other environmentally beneficial projects but had not filed seven Form R reports because it was unaware of its obligation to do so. In its appeal of the $39,792 assessed by the ALJ below, EPA seeks to increase the penalty, in part it appears because the company did not settle with EPA under the terms demanded by EPA, and in part because it appears EPA seeks to have its penalty policy ratified notwithstanding historic criticism by the EAB of the agency's rigid reliance on a policy that it declines to promulgate in accordance with federal law.

The major focus of EPA's Appeal is its assertion that the Administrative Law Judge ("ALJ") "unreasonably relaxed the standard set forth in the Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act (1986) And Section

6607 of The Pollution Prevention Act (1990) (Aug. 10, 1992) ('ERP')". Memorandum at 2-3. First, EPA claims that the Decision failed to document an "adequate factual basis" for the ALJ's reduction for "cooperation" and "compliance". Id. at 3. If anything, Catalina submits that the ALJ adhered too rigidly to the ERP in applying the reduction in light of the undisputed facts. Second, EPA claims that the reduction under the "other factors as justice may require" was neither consistent with prior EAB teaching nor supported by the record. Id. at 203. In fact, the reduction was well within prior principles articulated by the EAB guidelines and well supported by the record herein. As detailed in its Opening Brief, Catalina respectfully submits that a further substantial reduction in the penalty assessed would result in the most appropriate disposition of this case.

II. EPA Seeks to Have it Both Ways: It Wants to Rigidly Rely on Certain Parts But Deviate From Other Parts of its Defective Policy In Order To Maximize Penalties

A. The ALJ and EAB Are Bound Only by the Statutory Factors and Are Entitled and Expected to Use Discretion.

Federal law provides that persons who violate EPCRA § 313 may be liable for administrative penalties of up to $25,000. 42 USC § 11045(c), EPCRA § 325(c). It is now well recognized that Congress intended that the penalties which are assessed under Section 325(c) be subject to an appropriate degree of discretion depending on facts and circumstances. Apex Microtechnology, Inc. EPCRA-09-92-00-07 (May 7, 1993). The appropriate factors to consider in assessing penalties for violations of EPCRA § 313 are those set forth in the Toxic Substances Control Act, 15 U.S.C. § 2615 ("TSCA § 16").[1] EPCRA § 325(b)(2). These factors are controlling and a decision that is rationally supported by an evaluation of each of these factors is entitled to deference.

B. The ERP is a Non-Binding Policy

EPA's Appeal essentially seeks to have its ERP ratified by its assertion that the Decision

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[1] TSCA § 16 provides that determinations of civil penalties shall take into account the following factors: "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require."

did not follow rigidly the ERP. Complainant is on record as asserting that any "settlement must be within the limits of the [ERP]." EPA Status Report dated January 18, 1995.

Complainant's position is flawed for several fundamental reasons. First, the ERP has never been published for notice and comment.[2] At best, it is a non-binding agency policy whose application is open to attack in any particular case. McLaughlin Gormley King, FIFRA Appeal Nos. 95-2 through 95-7 (March 12, 1996). A penalty policy that has not been subjected to the rule making procedures of the Administrative Procedure Act ("APA") "does not carry the force of law." Wausau, id. at 16. The Agency can not "impermissibly engage[] in 'rote' penalty assessment or otherwise granting to the Penalty Policy the 'binding' or 'conclusive' effect that is properly reserved only for rules and for adjudicative precedents." Wausau, id. at 18. APA principles prohibit the unquestioning application of a penalty policy as if the policy were a rule with "binding effect." In re: Employers Insurance of Wausau and Ground Eight Technology, Inc. Docket Nos. TSCA-V-C-66-90 (February 11, 1997), (slip opinion) 1997 DEN 31 d35. Second, the ERP does not articulate reasons in support of its penalty calculation. In the Matter of Hall Signs, Inc., Docket No. 5-EPCRA-96-02 at 6 (October 30, 1997). Moreover, the ERP fails to take into account some of the statutory factors and provides only for upward adjustment of penalties for others. Decision at 31 and 33. Consequently, the ERP is neither binding nor entitled to special deference.

C. The ALJ and EAB Have Discretion to Reduce Penalties Beyond an EPA Penalty Policy.

In determining an appropriate penalty for EPCRA violations, the administrative law judge ("ALJ") and Environmental Appeals Board ("EAB") must evaluate any circumstances that mitigate or aggravate the violation and articulate the reasons that support the penalty. 40 CFR § 22.31. Congress intended that the penalties which are assessed under Section 325(c) be subject to an appropriate degree of discretion depending on facts and circumstances. In re Apex Microtechnology, Inc. EPCRA-09-92-00-07 (May 7, 1993). Even assuming, arguendo, that the

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[2] EPA conceded in the instant case that the EPCRA ERP has not been published in the Federal Register or otherwise published for notice and comment. Tr. 44.

ERP was an appropriate guideline, the Complainant's reliance in its brief on Pacific Refining and Wausau in support of its assertions that its ERP should be the basis for setting the penalty is misplaced. Memorandum at 4 and 8-9. Neither the ALJ nor the EAB is bound by the ERP, and both "are free to allow for additional penalty reductions in appropriate circumstances based on a full consideration of the statutory penalty factors. In fact, we have deviated from the penalty policies on several occasions." In re: Pacific Refining Company, EPCRA Appeal No. 94-1, Docket No. EPCRA-09-92-0001 (December 6, 1994) at 8. "Moreover, this Board has repeatedly stated that a Presiding Officer, having considered any applicable civil penalty guidelines issued by the Agency, is nonetheless free not to apply them to the case at hand." In re: Employers Insurance of Wausau and Group Eight Technology, Inc., TSCA Appeal No. 95-6 (February 11, 1997) at 15.

At bottom, Complainant seeks through rigid adherence to the ERP to set a minimal floor on penalty assessments and to provide only a minimal band within which to provide downward adjustments from the statutory maximum. Nowhere in the statute has Congress evinced such an intent. Rather, the statute provides for penalty assessments of up to $25,000. It necessarily follows that the range of penalties runs from $1.00 to $25,000, and that the particular penalty to be assessed rests in the sound discretion of the ALJ anywhere within this range by taking into account the statutory factors and the factual record as developed at hearing. Consistent with these principles, in the instant case the ALJ could and should have reduced the penalty assessment even further based on the record before him.

III. The Decision's Reduction for Attitude Was Justified

A. The Decision Was At the Least Amply Supported by the Record.

The Decision closely followed the ERP in evaluating the appropriate adjustment for "attitude." EPA overlooks this adherence and asserts there was inadequate support for the reduction. In fact, there was substantial evidence to support a reduction for "attitude" both at the hearing and in the Decision.

In assessing "attitude", the ERP evaluates two factors, cooperation and compliance. The ERP states that reductions can be made "based on the cooperation extended to EPA throughout

the compliance evaluation/enforcement process or the lack thereof." ERP at 18. The undisputed evidence at the hearing was that Catalina cooperated with EPA at all times. Catalina testified as to its accommodation to the EPA inspector. Tr. at 90 and 94-6. Moreover, the EPA witness conceded that Catalina cooperated with EPA. Tr. at 39. The evidence on Catalina's cooperation was cited by the Decision in support of the reduction pursuant to the ERP. Decision at 33. EPA's position appears to be that a reduction for cooperation is only provided to companies that settle with EPA on EPA's terms alone. Memorandum at 19. It appears that, with a curious logic, EPA seeks to punish Catalina for exercising its legal rights in seeking to have the penalty assessed by a neutral administrative law judge.

With respect to compliance, Catalina testified that it retained *on the very day that EPA informed Catalina that it was subject to EPCRA § 313 reporting* a consultant to assist Catalina in preparing the Form R reports. Tr. 90-91. Catalina testified that it began its research into past records within three or four days of the EPA visit wherein Catalina Form R filing obligation was first identified. Tr. at 91. Catalina testified that it had to review past records with respect to materials used to determine whether any EPCRA § 313 chemicals were present in those materials and, if so, to determine whether any applicable thresholds were exceeded. Tr. at 91. Catalina testified as to the research required to reconstruct information on its past use of materials in order to accurately determine which chemicals for which year required a Form R report. Tr. at 91 and 99. Catalina testified that it was a priority project. Tr. at 95. Catalina also testified that the Northridge Earthquake and subsequent electrical fire at Catalina in mid-January 1994 caused extensive damage and disruption of files at Catalina, resulting in a four month plant closing. Catalina 91-94. The Decision itself referenced the evidence to support the reduction based on compliance. Decision at 33-35. Consequently, based on the evidence in the record, a substantial adjustment downward of the proposed penalty based on attitude is appropriate, and a more substantial reduction would be justified.

B. EPA's Objection To the Reduction for Attitude, Which Was Consistent With the ERP, Appears Disingenuous at Best

The EPA assertion that the Decision's reduction for "attitude" (which was consistent with the ERP) is unwarranted is specious. In fact, EPA testified that while under its interpretation of

the ERP it could not make such adjustments, they were available to the ALJ. Tr. at 54-55. Having weighed the facts, the ALJ so ruled. As noted in the Decision at 29, EPA considers an adjustment for attitude *if and only if* the company settles on EPA's terms which in this case meant rigid adherence to the ERP as interpreted by Region IX staff. Such a position is untenable. As noted by ALJ Nissen, the offer of a reduction for attitude only during settlement coupled with rigid application of the ERP "make[s] a mockery of 'good faith' negotiations." In the Matter of Catalina Yachts, Inc., Docket No. EPCRA-09-94-0015. at 5 (January 10, 1995). It is also "simply arbitrary" because, "having elected to determine the penalty in accordance with the ERP, [EPA] may not 'pick and choose' the provisions of the ERP with which it will comply." Decision at 29.

IV. Justice

A. The Reduction for "Other Factors as Justice May Require" Was Amply Supported in the Record and by Precedent.

The ALJ is entitled to make a reduction under the "other factors as justice may require" ("Justice Factor") with a consideration of "the totality of the circumstances giving rise to the violation in adjusting the gravity-based penalty, particularly when the Presiding Officer was persuaded by the evidence that such circumstances were truly aberrational, of limited duration and not likely to recur." Pacific Refining Company, supra at 8. Indeed, the EAB has upheld an ALJ's determination to reduce the cumulative total penalty for all violations by 75% when the cumulative total was found "excessive" and when the adjustment was based on the need to achieve deterrence without being unduly punitive." In re: Sav-Mart, Inc., Docket No. FIFRA-09-0819-C-92-36 (March 8, 1995). Catalina credibly testified that it was not aware of its obligation to file Form R reports, Tr. at 120, and that it hired a consultant to assist it on the day it became aware of its obligation to file Form Rs. Tr. at 91. The Decision recognized Catalina's voluntary activities as evidence of good corporate citizenship deserving of recognition by a reduction under this factor. Decision at 37.

EAB has stated that

> As a matter of policy, the Agency obviously looks favorably upon the undertaking of a project which benefits the environment and which goes beyond the requirements of environmental laws. By considering such behavior in a penalty

> assessment proceeding the Agency can provide an incentive for companies to engage in environmentally beneficial activities.

Spang, supra, at 28. Significantly, Catalina voluntarily engaged in several, meaningful environmentally beneficial projects. Complainant states that Catalina may have been required by law to undertake these projects. Memorandum at 14. Complainant offers no suggested potentially applicable requirement, however. In fact, the record is crystal clear. Catalina testified that each of these projects was voluntarily undertaken; none was required by an agency or regulation. Tr. 110. Complainant also asserts that Catalina's motive was merely "business." Memorandum at 14. Catalina's testimony was clear: its reasons were to reduce emissions to reduce exposures to its employees and to the surrounding community and because its customers are sensitive to environmental issues. Tr. at 118-119.

The first environmentally beneficial project was the virtual total elimination of acetone by switching to a substitute solvent. Tr. 106. Catalina began to eliminate acetone use in 1991, Tr. 104-5, well before the 1993 EPA inspection, and well before the chemical was delisted. The EAB noted in Spang, supra, that an environmentally beneficial project begun before enforcement action is entitled significant deference. Catalina testified that the annual costs were $35,000-$40,000 in increased labor, and $12,000-$14,000 in operating costs. Tr. 110-111. The Decision noted these costs. Decision at 24 and 38. Catalina also incurred capital costs of $30,000 to purchase the necessary still. Tr. 110.

Another environmentally beneficial project was the cessation of anti-fouling painting of boat bottoms. Catalina chose to forego this profitable operation in order to reduce emissions. Tr. 114. This decision in 1994 resulted in a loss of profit of $28,000-$30,000. Tr. 114. Significantly, some of the paints had EPCRA § 313 chemicals in them.[3] Tr. 131.

In this regard, the Decision credited only a small fraction (30%) of the cumulative costs associated with environmentally beneficial projects, a result which Catalina appeals. To place the issue in perspective, in Spang, in setting a penalty for fourteen (14) violations of EPCRA § 313

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[3] Catalina testified that none of the chemicals in anti-fouling paints were used over EPCRA § 313 thresholds.

reports, the EAB remanded a 71% reduction for assurance that the projects had a nexus to the violation and were appropriate projects. Spang. Significantly, the EAB held that a determination whether a project is an environmentally beneficial project that is eligible for penalty reduction and the appropriate level of reduction is properly within the discretion of the presiding officer. As stated by the EAB, "[b]ecause of the open-ended nature of the justice factor and the myriad factual scenarios that may arise under it, it would be impossible, and therefore unwise, for this Board to go beyond this general guidance and try to establish a set of rules to govern the application of the justice factor to a particular type of claim." Spang, supra at 30.

The Decision herein held that the environmentally beneficial projects voluntarily undertaken by Catalina "appear to be precisely the type of voluntary activities which should be encouraged." Decision at 37. The Decision devoted one-third of its Discussion to a review of the voluntary environmentally beneficial projects. This review was amply supported by references to the evidence on these projects which was presented by Catalina and for which Complainant made no objection. Decision at 36-39. It also noted the community outreach programs undertaken by Catalina. Decision at 39. The Decision was amply supported, and EPA's contention has no merit. For the reasons set forth in Catalina's opening brief, Catalina submits that substantially greater credit should have been awarded under the principles of Spang, and the company requests the EAB to make such a further adjustment consistent with Spang.

B. The Evidence was Properly Considered and The EPA Was on Notice of the Costs.

When asked whether EPA was aware of the environmentally beneficial projects undertaken by Catalina, the EPA witness testified that "Catalina Yachts made [EPA] aware of the extra expenditures." Tr. at 35. EPA chose to not consider these voluntary expenditures in the proposed penalty. Tr. at 35. Throughout Catalina's testimony at the hearing on the description of its environmentally beneficial projects and their associated costs, Tr. at 99-119, the only objection raised by EPA was an objection concerning the use of local air emissions reports as proof of emission reduction. Tr. at 107-8. There was no objection to Catalina's testimony on its acetone reduction and associated costs, Tr. at 110-113; no objection to elimination of emissions from anti-fouling paints based on the elimination of painting of boat bottoms and the associated

loss of profits, Tr. at 113-114; no objection to reduction of styrene emissions based on the switch from spray to brush application of gel coat and the associated costs, Tr. at 114-116; and no objection to reduction in VOC emissions based on the switch to water based glue. Tr. at 117--8. In the entire cross-examination of Catalina's witness, Tr. at 121-131, EPA never asked for further information on the costs of these projects.

Finally, as noted in the Decision, "[p]recision in documenting costs of environmentally beneficial projects] is not required, however, because environmentally beneficial expenditures do not offset gravity-based penalty amounts dollar-for-dollar. Decision at 38. The Decision calculated $230,000 in costs and/or lost profits, Decision at 39, although it noted that Catalina claimed in its Opening Brief capital expenditures of a $308,000 and annual expenses of $91,000 to $106,000. Id. at 38. Moreover, because each of the four projects involved emissions of chemicals, and because two of those projects concerned acetone and styrene, there is a strong nexus between the violation and the projects consistent with Spang, as noted by the Decision at 37. Also to be noted is that, as a direct result of Catalina's pioneering and voluntary efforts, other companies in Southern California also reduced their toxic emissions. Decision at 25. The voluntary activities "appear to be precisely the type of voluntary activities which should be encouraged." Decision at 37. Consequently, there is more than ample justification for the 71% reduction as provided in Spang, let alone the 30% reduction provided in the Decision herein.

C. Under EPA's Own Guidance, the Penalty Assessment Was Far Less Than Warranted by the Facts and Precedent

Under EPA's new policy on Supplemental Environmental Projects ("SEP Policy"), Catalina would be entitled to a 75% reduction of the gravity based penalty.[4] (Copy attached hereto for ease of reference.) The four environmentally beneficial projects undertaken by Catalina fit squarely into the revised SEP Policy. In the SEP Policy, EPA lists three criteria for acceptable SEPs: 1) the project must meet the basic definition of a SEP; 2) the legal guidelines and nexus must be satisfied; 3) the project must fit into a designated category. Significantly, for appropriate

[4] While the recently issued SEP Policy is not officially effective until May 1, 1998, the EAB may take judicial notice of its provisions, even though, like the ERP, the Policy is not binding.

SEPs, the SEP Policy provides that the penalty can be as low as 25% of the gravity component or 10% of the gravity component plus economic benefit, whichever is greater. Section E.

As for the first criterion, the project "must improve, protect, or reduce risks to public health, or the environment at large." Section B. The project must not be required by any federal, state or local law. Id. All four projects here involved significant reductions in emissions of toxic chemicals and none of the projects was required by federal, state or local regulations. As for the second criterion, the project must a) reduce the likelihood of a similar violation; b) reduce the adverse impact to public health or the environment which the violation contributes to; and c) the project must reduce the overall risk to public health or the environment. Section C. All four projects reduced substantially air emissions at the facility and two of the projects involved acetone and styrene, the chemicals associated with the violation. Because acetone use was effectively eliminated, it directly lead to compliance during the relevant time period. As to the third criterion, the project must meet at least one of 8 categories. Section D. The Catalina projects meet two categories: pollution prevention (source reduction) and pollution reduction (reduced emissions).

Catalina testified that there was no economic benefit to Catalina for not timely filing Form Rs. Consequently, under the SEP Policy, Catalina would be entitled to a 75% reduction -- not the 30% allowed in the Decision.

V. Conclusion

Catalina Yachts, Inc. respectfully submits that the appeal taken by EPA herein is patently mistaken on both the facts and the law. Simply put, EPA has argued no more than it wants more money and that it wants the ERP rigidly adhered to as interpreted solely by agency staff. Neither position has merit.

In contrast, Catalina both at hearing and on appeal has presented a cogent position as to why, when applying the applicable statutory penalty assessment factors to the undisputed facts of this case, an assessment of not greater than $10,000 would be appropriate. The purpose of specific and general deterrence would be served, and the penalty would not be unduly punitive, which any greater assessment would be.

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Dated: April 23, 1998

Respectfully submitted,

BEVERIDGE & DIAMOND LLP
Attorneys for Catalina Yachts, Inc.

By: E.M. Nottoli by RDW
Eileen M. Nottoli

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 10 1998

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Issuance of Final Supplemental Environmental Projects Policy

FROM: Steven A. Herman
Assistant Administrator

TO: Regional Administrators

I am pleased to issue the final Supplemental Environmental Projects (SEP) Policy, the product of almost three years of experience implementing and fine-tuning the 1995 Interim Revised SEP Policy. It is also the product of the cooperative effort of the SEP Workgroup, comprised of representatives of the Regions, various OECA offices, OGC and DOJ. This Policy is effective May 1, 1998, and supersedes the Interim SEP Policy.

Most of the changes made to the Interim SEP Policy are clarifications to the existing language. There are no radical changes and the basic structure and operation of the SEP Policy remains the same. The major changes to the SEP Policy include:

1. Community Input. The final SEP Policy contains a new section to encourage the use of community input in developing projects in appropriate cases and there is a new penalty mitigation factor for community input. We are preparing a public pamphlet that explains the Policy in simple terms to facilitate implementation of this new section.

2. Categories of Acceptable Projects. The categories of acceptable projects have remained largely the same, with some clarifications and a few substantive changes. There is now a new "other" category under which worthwhile projects that do not fit within any of the defined categories, but are otherwise consistent with all other provisions of the SEP Policy, may qualify as SEPs with advance OECA approval. The site assessment subcategory has been revised and renamed to "environmental quality assessments." The environmental management system subcategory has been eliminated.

3. Use of SEPS to Mitigate Stipulated Penalties. The final SEP Policy prohibits the use of SEPs to mitigate claims for stipulated penalties, but does indicate that in certain defined extraordinary circumstances, I may approve a deviation from this prohibition.

4. Penalty Calculation Methodology. The penalty calculation steps have been better defined and broken into five steps rather than three. A calculation worksheet, keyed to the text of the Policy, has been added. The penalty mitigation guidelines have not been substantively changed, only clarified.

5. Legal Guidelines. The legal guidelines have been revised to improve clarity and provide better guidance. The nexus legal guideline has been revised to make it easier to apply. The fifth legal guideline concerning appropriations has been revised and subdivided into four sections.

Questions regarding the final SEP Policy should be directed to Ann Kline (202-564-0119) in the Multimedia Enforcement Division.

Attachment

cc: (w/attachment)
OECA Office Directors
Regional Counsels, Regions I-X
Director, Office of Environmental Stewardship, Region I
Director, Division of Enforcement and Compliance Assurance, Region II
Director, Compliance Assurance and Enforcement Division, Region VI
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EPA SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY

Effective May 1, 1998

A. INTRODUCTION

1. Background

In settlements of environmental enforcement cases, the U.S. Environmental Protection Agency (EPA) requires the alleged violators to achieve and maintain compliance with Federal environmental laws and regulations and to pay a civil penalty. To further EPA's goals to protect and enhance public health and the environment, in certain instances environmentally beneficial projects, or Supplemental Environmental Projects (SEPs), may be part of the settlement. This Policy sets forth the types of projects that are permissible as SEPs, the penalty mitigation appropriate for a particular SEP, and the terms and conditions under which they may become part of a settlement. The primary purpose of this Policy is to encourage and obtain environmental and public health protection and improvements that may not otherwise have occurred without the settlement incentives provided by this Policy.

In settling enforcement actions, EPA requires alleged violators to promptly cease the violations and, to the extent feasible, remediate any harm caused by the violations. EPA also seeks substantial monetary penalties in order to deter noncompliance. Without penalties, regulated entities would have an incentive to delay compliance until they are caught and ordered to comply. Penalties promote environmental compliance and help protect public health by deterring future violations by the same violator and deterring violations by other members of the regulated community. Penalties help ensure a national level playing field by ensuring that violators do not obtain an unfair economic advantage over their competitors who made the necessary expenditures to comply on time. Penalties also encourage regulated entities to adopt pollution prevention and recycling techniques in order to minimize their pollutant discharges and reduce their potential liabilities.

Statutes administered by EPA generally contain penalty assessment criteria that a court or administrative law judge must consider in determining an appropriate penalty at trial or a hearing. In the settlement context, EPA generally follows these criteria in exercising its discretion to establish an appropriate settlement penalty. In establishing an appropriate penalty, EPA considers such factors as the economic benefit associated with the violations, the gravity or seriousness of the violations, and prior history of violations. Evidence of a violator's commitment and ability to perform a SEP is also a relevant factor for EPA to consider in establishing an appropriate settlement penalty. All else being equal, the final settlement penalty will be lower for a violator who agrees to perform an acceptable SEP compared to the violator who does not agree to perform a SEP.

The Agency encourages the use of SEPs that are consistent with this Policy. SEPs may not be appropriate in settlement of all cases, but they are an important part of EPA's enforcement program. While penalties play an important role in environmental protection by deterring violations and creating a level playing field, SEPs can play an additional role in securing significant environmental or public health protection and improvements. SEPs may be particularly appropriate to further the objectives in the statutes EPA administers and to achieve other policy goals, including promoting pollution prevention and environmental justice.

2. Pollution Prevention and Environmental Justice

The Pollution Prevention Act of 1990 (42 U.S.C. § 13101 et seq., November 5, 1990) identifies an environmental management hierarchy in which pollution "should be prevented or reduced whenever feasible; pollution that cannot be prevented should be recycled in an environmentally safe manner whenever feasible; pollution that cannot be prevented or recycled should be treated in an environmentally safe manner whenever feasible; and disposal or other release into the environment should be employed only as a last resort ..." (42 U.S.C. §13103). Selection and evaluation of proposed SEPs should be conducted generally in accordance with this hierarchy of environmental management, i.e., SEPs involving pollution prevention techniques are preferred over other types of reduction or control strategies, and this can be reflected in the degree of consideration accorded to a defendant/respondent before calculation of the final monetary penalty.

Further, there is an acknowledged concern, expressed in Executive Order 12898 on environmental justice, that certain segments of the nation's population, i.e., low-income and/or minority populations, are disproportionately burdened by pollutant exposure. Emphasizing SEPs in communities where environmental justice concerns are present helps ensure that persons who spend significant portions of their time in areas, or depend on food and water sources located near, where the violations occur would be protected. Because environmental justice is not a specific technique or process but an overarching goal, it is not listed as a particular SEP category; but EPA encourages SEPs in communities where environmental justice may be an issue.

3. Using this Policy

In evaluating a proposed project to determine if it qualifies as a SEP and then determining how much penalty mitigation is appropriate, Agency enforcement and compliance personnel should use the following five-step process:

(1) Ensure that the project meets the basic definition of a SEP. (Section B)
(2) Ensure that all legal guidelines, including nexus, are satisfied. (Section C)
(3) Ensure that the project fits within one (or more) of the designated categories of SEPs. (Section D)
(4) Determine the appropriate amount of penalty mitigation. (Section E)
(5) Ensure that the project satisfies all of the implementation and other criteria. (Sections F, G, H, I and J)

4. Applicability

This Policy revises and hereby supersedes the February 12, 1991 *Policy on the Use of Supplemental Environmental Projects in EPA Settlements* and the May 1995 *Interim Revised Supplemental Environmental Projects Policy*. This Policy applies to settlements of all civil judicial and administrative actions filed after the effective date of this Policy (May 1, 1998), and to all pending cases in which the government has not reached agreement in principle with the alleged violator on the specific terms of a SEP.

This Policy applies to all civil judicial and administrative enforcement actions taken under the authority of the environmental statutes and regulations that EPA administers. It also may be used by EPA and the Department of Justice in reviewing proposed SEPs in settlement of citizen suits. This Policy also applies to federal agencies that are liable for the payment of civil penalties. Claims for stipulated penalties for violations of consent decrees or other settlement agreements may not be mitigated by the use of SEPs.[1]

This is a settlement Policy and thus is not intended for use by EPA, defendants, respondents, courts or administrative law judges at a hearing or in a trial. Further, whether the Agency decides to accept a proposed SEP as part of a settlement, and the amount of any penalty mitigation that may be given for a particular SEP, is purely within EPA's discretion. Even though a project appears to satisfy all of the provisions of this Policy, EPA may decide, for one or more reasons, that a SEP is not appropriate (e.g., the cost of reviewing a SEP proposal is excessive, the oversight costs of the SEP may be too high, the defendant/respondent may not have the ability or reliability to complete the proposed SEP, or the deterrent value of the higher penalty amount outweighs the benefits of the proposed SEP).

This Policy establishes a framework for EPA to use in exercising its enforcement discretion in determining appropriate settlements. In some cases, application of this Policy may not be appropriate, in whole or part. In such cases, the litigation team may, with the advance approval of Headquarters, use an alternative or modified approach.

[1] In extraordinary circumstances, the Assistant Administrator may consider mitigating potential stipulated penalty liability using SEPs where: (1) despite the circumstances giving rise to the claim for stipulated penalties, the violator has the ability and intention to comply with a new settlement agreement obligation to implement the SEP; (2) there is no negative impact on the deterrent purposes of stipulated penalties; and (3) the settlement agreement establishes a range for stipulated penalty liability for the violations at issue. For example, if a respondent/defendant has violated a settlement agreement which provides that a violation of X requirement subjects it to a stipulated penalty between $1,000 and $5,000, then the Agency may consider SEPs in determining the specific penalty amount that should be demanded.

B. DEFINITION AND KEY CHARACTERISTICS OF A SEP

Supplemental environmental projects are defined as **environmentally beneficial projects** which a defendant/respondent agrees to undertake **in settlement of an enforcement action,** but which the defendant/respondent is **not otherwise legally required to perform.** The three bolded key parts of this definition are elaborated below.

"Environmentally beneficial" means a SEP must improve, protect, or reduce risks to public health, or the environment at large. While in some cases a SEP may provide the alleged violator with certain benefits, there must be no doubt that the project primarily benefits the public health or the environment.

"In settlement of an enforcement action" means: 1) EPA has the opportunity to help shape the scope of the project before it is implemented; and 2) the project is not commenced until after the Agency has identified a violation (e.g., issued a notice of violation, administrative order, or complaint).[2]

"Not otherwise legally required to perform means" the project or activity is not required by any federal, state or local law or regulation. Further, SEPs cannot include actions which the defendant/respondent is likely to be required to perform:

(a) as injunctive relief[3] in the instant case;
(b) as injunctive relief in another legal action EPA, or another regulatory agency could bring;
(c) as part of an existing settlement or order in another legal action; or,
(d) by a state or local requirement.

SEPs may include activities which the defendant/respondent will become legally obligated to undertake two or more years in the future, if the project will result in the facility coming into compliance earlier than the deadline. Such "accelerated compliance" projects are not allowable,

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[2] Since the primary purpose of this Policy is to obtain environmental or public health benefits that may not have occurred "but for" the settlement, projects which the defendant has previously committed to perform or have been started before the Agency has identified a violation are not eligible as SEPs. Projects which have been committed to or started before the identification of a violation may mitigate the penalty in other ways. Depending on the specifics, if a regulated entity had initiated environmentally beneficial projects before the enforcement process commenced, the initial penalty calculation could be lower due to the absence of recalcitrance, no history of other violations, good faith efforts, less severity of the violations, or a shorter duration of the violations.

[3] The statutes EPA administers generally provide a court with broad authority to order a defendant to cease its violations, take necessary steps to prevent future violations, and to remediate any harm caused by the violations. If a court is likely to order a defendant to perform a specific activity in a particular case, such an activity does not qualify as a SEP.

however, if the regulation or statute provides a benefit (e.g., a higher emission limit) to the defendant/respondent for early compliance.

Also, the performance of a SEP reduces neither the stringency nor timeliness requirements of Federal environmental statutes and regulations. Of course, performance of a SEP does not alter the defendant/respondent's obligation to remedy a violation expeditiously and return to compliance.

C. LEGAL GUIDELINES

EPA has broad discretion to settle cases, including the discretion to include SEPs as an appropriate part of the settlement. The legal evaluation of whether a proposed SEP is within EPA's authority and consistent with all statutory and Constitutional requirements may be a complex task. Accordingly, this Policy uses five legal guidelines to ensure that our SEPs are within the Agency's and a federal court's authority, and do not run afoul of any Constitutional or statutory requirements.[4]

1. A project cannot be inconsistent with any provision of the underlying statutes.

2. All projects must advance at least one of the objectives of the environmental statutes that are the basis of the enforcement action and must have adequate nexus. Nexus is the relationship between the violation and the proposed project. This relationship exists only if:

   a. the project is designed to reduce the likelihood that similar violations will occur in the future; or

   b. the project reduces the adverse impact to public health or the environment to which the violation at issue contributes; or

   c. the project reduces the overall risk to public health or the environment potentially affected by the violation at issue.

Nexus is easier to establish if the primary impact of the project is at the site where the alleged violation occurred or at a different site in the same ecosystem or within the immediate geographic[5] area. Such SEPs may have sufficient nexus even if the SEP

[4] These legal guidelines are based on federal law as it applies to EPA; States may have more or less flexibility in the use of SEPs depending on their laws.

[5] The immediate geographic area will generally be the area within a 50 mile radius of the site on which the violations occurred. Ecosystem or geographic proximity is not by itself a sufficient basis for nexus; a project must always satisfy subparagraph a, b, or c in the definition of nexus. In some cases, a project may be performed at a facility or site not owned by the defendant/respondent.

addresses a different pollutant in a different medium. In limited cases, nexus may exist even though a project will involve activities outside of the United States.[6] The cost of a project is not relevant to whether there is adequate nexus.

3. EPA may not play any role in managing or controlling funds that may be set aside or escrowed for performance of a SEP. Nor may EPA retain authority to manage or administer the SEP. EPA may, of course, perform oversight to ensure that a project is implemented pursuant to the provisions of the settlement and have legal recourse if the SEP is not adequately performed.

4. The type and scope of each project are defined in the signed settlement agreement. This means the "what, where and when" of a project are defined by the settlement agreement. Settlements in which the defendant/respondent agrees to spend a certain sum of money on a project(s) to be defined later (after EPA or the Department of Justice signs the settlement agreement) are not allowed.

5. a. A project cannot be used to satisfy EPA's statutory obligation or another federal agency's obligation to perform a particular activity. Conversely, if a federal statute prohibits the expenditure of federal resources on a particular activity, EPA cannot consider projects that would appear to circumvent that prohibition

b. A project may not provide EPA or any federal agency with additional resources to perform a particular activity for which Congress has specifically appropriated funds. A project may not provide EPA with additional resources to perform a particular activity for which Congress has earmarked funds in an appropriations committee report.[7] Further, a project cannot be used to satisfy EPA's statutory or earmark obligation, or another federal agency's statutory obligation, to spend funds on a particular activity. A project, however, may be related to a particular activity for which Congress has specifically appropriated or earmarked funds.

c. A project may not provide additional resources to support specific activities performed by EPA employees or EPA contractors. For example, if EPA has developed a brochure to help a segment of the regulated community comply with environmental requirements, a project may not directly, or indirectly, provide additional resources to revise, copy or distribute the brochure.

d. A project may not provide a federal grantee with additional funds to perform a specific task identified within an assistance agreement.

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[6] All projects which would include activities outside the U.S. must be approved in advance by Headquarters and/or the Department of Justice. See section J.

[7] Earmarks are instructions for changes to EPA's discretionary budget authority made by appropriations committee in committee reports that the Agency generally honors as a matter of policy.

D. CATEGORIES OF SUPPLEMENTAL ENVIRONMENTAL PROJECTS

EPA has identified seven specific categories of projects which may qualify as SEPs. In order for a proposed project to be accepted as a SEP, it must satisfy the requirements of at least one category plus all the other requirements established in this Policy.

1. Public Health

A public health project provides diagnostic, preventative and/or remedial components of human health care which is related to the actual or potential damage to human health caused by the violation. This may include epidemiological data collection and analysis, medical examinations of potentially affected persons, collection and analysis of blood/fluid/ tissue samples, medical treatment and rehabilitation therapy.

Public health SEPs are acceptable only where the primary benefit of the project is the population that was harmed or put at risk by the violations.

2. Pollution Prevention

A pollution prevention project is one which reduces the generation of pollution through "source reduction," i.e., any practice which reduces the amount of any hazardous substance, pollutant or contaminant entering any waste stream or otherwise being released into the environment, prior to recycling, treatment or disposal. (After the pollutant or waste stream has been generated, pollution prevention is no longer possible and the waste must be handled by appropriate recycling, treatment, containment, or disposal methods.)

Source reduction may include equipment or technology modifications, process or procedure modifications, reformulation or redesign of products, substitution of raw materials, and improvements in housekeeping, maintenance, training, inventory control, or other operation and maintenance procedures. Pollution prevention also includes any project which protects natural resources through conservation or increased efficiency in the use of energy, water or other materials. "In-process recycling," wherein waste materials produced during a manufacturing process are returned directly to production as raw materials on site, is considered a pollution prevention project.

In all cases, for a project to meet the definition of pollution prevention, there must be an overall decrease in the amount and/or toxicity of pollution released to the environment, not merely a transfer of pollution among media. This decrease may be achieved directly or through increased efficiency (conservation) in the use of energy, water or other materials. This is consistent with the Pollution Prevention Act of 1990 and the Administrator's "Pollution Prevention Policy Statement: New Directions for Environmental Protection," dated June 15, 1993

3. Pollution Reduction

If the pollutant or waste stream already has been generated or released, a pollution reduction approach -- which employs recycling, treatment, containment or disposal techniques -- may be appropriate. A pollution reduction project is one which results in a decrease in the amount and/or toxicity of any hazardous substance, pollutant or contaminant entering any waste stream or otherwise being released into the environment by an operating business or facility by a means which does not qualify as "pollution prevention." This may include the installation of more effective end-of-process control or treatment technology, or improved containment, or safer disposal of an existing pollutant source. Pollution reduction also includes "out-of-process recycling," wherein industrial waste collected after the manufacturing process and/or consumer waste materials are used as raw materials for production off-site.

4. Environmental Restoration and Protection

An environmental restoration and protection project is one which enhances the condition of the ecosystem or immediate geographic area adversely affected.[8] These projects may be used to restore or protect natural environments (such as ecosystems) and man-made environments, such as facilities and buildings. This category also includes any project which protects the ecosystem from actual or potential damage resulting from the violation or improves the overall condition of the ecosystem.[9] Examples of such projects include: restoration of a wetland in the same ecosystem along the same avian flyway in which the facility is located; or purchase and management of a watershed area by the defendant/respondent to protect a drinking water supply where the violation (e.g., a reporting violation) did not directly damage the watershed but potentially could lead to damage due to unreported discharges. This category also includes projects which provide for the protection of endangered species (e.g., developing conservation programs or protecting habitat critical to the well-being of a species endangered by the violation).

In some projects where a defendant/respondent has agreed to restore and then protect certain lands, the question arises as to whether the project may include the creation or maintenance of certain recreational improvements, such as hiking and bicycle trails. The costs associated with such recreational improvements may be included in the total SEP cost provided they do not impair the environmentally beneficial purposes of the project and they constitute only an incidental portion of the total resources spent on the project.

In some projects where the parties intend that the property be protected so that the ecological and pollution reduction purposes of the land are maintained in perpetuity, the defendant/respondent may sell or transfer the land to another party with the established resources

[8] If EPA lacks authority to require repair of the damage caused by the violation, then repair itself may constitute a SEP.

[9] Simply preventing new discharges into the ecosystem, as opposed to taking affirmative action directly related to preserving existing conditions at a property, would not constitute a restoration and protection project, but may fit into another category such as pollution prevention or pollution reduction.

and expertise to perform this function, such as a state park authority. In some cases, the U.S. Fish and Wildlife Service or the National Park Service may be able to perform this function.[10]

With regard to man-made environments, such projects may involve the remediation of facilities and buildings, provided such activities are not otherwise legally required. This includes the removal/mitigation of contaminated materials, such as soils, asbestos and lead paint, which are a continuing source of releases and/or threat to individuals.

5. Assessments and Audits

Assessments and audits, if they are not otherwise available as injunctive relief, are potential SEPs under this category. There are three types of projects in this category: a. pollution prevention assessments; b. environmental quality assessments; and c. compliance audits. These assessments and audits are only acceptable as SEPs when the defendant/respondent agrees to provide EPA with a copy of the report. The results may be made available to the public, except to the extent they constitute confidential business information pursuant to 40 CFR Part 2, Subpart B.

a. Pollution prevention assessments are systematic, internal reviews of specific processes and operations designed to identify and provide information about opportunities to reduce the use, production, and generation of toxic and hazardous materials and other wastes. To be eligible for SEPs, such assessments must be conducted using a recognized pollution prevention assessment or waste minimization procedure to reduce the likelihood of future violations. Pollution prevention assessments are acceptable as SEPs without an implementation commitment by the defendant/respondent. Implementation is not required because drafting implementation requirements before the results of an assessment are known is difficult. Further, many of the implementation recommendations may constitute activities that are in the defendant/respondent's own economic interest.

b. Environmental quality assessments are investigations of: the condition of the environment at a site not owned or operated by the defendant/respondent; the environment impacted by a site or a facility regardless of whether the site or facility is owned or operated by the defendant/respondent; or threats to human health or the environment relating to a site or a facility regardless of whether the site or facility is owned or operated by the defendant/respondent. These include, but are not limited to: investigations of levels or sources of contamination in any environmental media at a site; or monitoring of the air, soil, or water quality surrounding a site or facility. To be eligible as SEPs, such assessments must be conducted in accordance with recognized protocols, if available, applicable to the type of assessment to be undertaken. Expanded sampling or monitoring by a defendant/respondent of its own emissions or operations does not qualify as a SEP to the extent it is ordinarily available as injunctive relief.

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[10] These federal agencies have explicit statutory authority to accept gifts of land and money in certain circumstances. All projects with these federal agencies must be reviewed and approved in advance by legal counsel in the agency, usually the Solicitor's Office in the Department of the Interior.

Environmental quality assessment SEPs may not be performed on the following types of sites: sites that are on the National Priority List under CERCLA § 105, 40 CFR Part 300, Appendix B; sites that would qualify for an EPA removal action pursuant to CERCLA §104(a) and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR § 300.415; and sites for which the defendant/respondent or another party would likely be ordered to perform a remediation activity pursuant to CERCLA §106, RCRA §7003, RCRA 3008(h), CWA § 311, or another federal law.

c. Environmental compliance audits are independent evaluations of a defendant/respondent's compliance status with environmental requirements. Credit is only given for the costs associated with conducting the audit. While the SEP should require all violations discovered by the audit to be promptly corrected, no credit is given for remedying the violation since persons are required to achieve and maintain compliance with environmental requirements. In general, compliance audits are acceptable as SEPs only when the defendant/respondent is a small business or small community.[11] [12]

6. Environmental Compliance Promotion

An environmental compliance promotion project provides training or technical support to other members of the regulated community to: 1) identify, achieve and maintain compliance with applicable statutory and regulatory requirements or 2) go beyond compliance by reducing the generation, release or disposal of pollutants beyond legal requirements. For these types of projects, the defendant/respondent may lack the experience, knowledge or ability to implement the project itself, and, if so, the defendant/respondent should be required to contract with an appropriate expert to develop and implement the compliance promotion project. Acceptable projects may include, for example, producing a seminar directly related to correcting widespread or prevalent violations within the defendant/ respondent's economic sector.

Environmental compliance promotion SEPs are acceptable only where the primary impact of the project is focused on the same regulatory program requirements which were violated and where EPA has reason to believe that compliance in the sector would be significantly advanced by the proposed project. For example, if the alleged violations involved Clean Water Act pretreatment violations, the compliance promotion SEP must be directed at ensuring compliance with pretreatment requirements. Environmental compliance promotion SEPs are subject to special approval requirements per Section J below.

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[11] For purposes of this Policy, a small business is owned by a person or another entity that employs 100 or fewer individuals. Small businesses could be individuals, privately held corporations, farmers, landowners, partnerships and others. A small community is one comprised of fewer than 2,500 persons.

[12] Since most large companies routinely conduct compliance audits, to mitigate penalties for such audits would reward violators for performing an activity that most companies already do. In contrast, these audits are not commonly done by small businesses, perhaps because such audits may be too expensive.

7. Emergency Planning and Preparedness

An emergency planning and preparedness project provides assistance -- such as computers and software, communication systems, chemical emission detection and inactivation equipment, HAZMAT equipment, or training -- to a responsible state or local emergency response or planning entity. This is to enable these organizations to fulfill their obligations under the Emergency Planning and Community Right-to-Know Act (EPCRA) to collect information to assess the dangers of hazardous chemicals present at facilities within their jurisdiction, to develop emergency response plans, to train emergency response personnel and to better respond to chemical spills.

EPCRA requires regulated sources to provide information on chemical production, storage and use to State Emergency Response Commissions (SERCs), Local Emergency Planning Committees (LEPCs) and Local Fire Departments (LFDs). This enables states and local communities to plan for and respond effectively to chemical accidents and inform potentially affected citizens of the risks posed by chemicals present in their communities, thereby enabling them to protect the environment or ecosystems which could be damaged by an accident. Failure to comply with EPCRA impairs the ability of states and local communities to meet their obligations and places emergency response personnel, the public and the environment at risk from a chemical release.

Emergency planning and preparedness SEPs are acceptable where the primary impact of the project is within the same emergency planning district or state affected by the violations and EPA has not previously provided the entity with financial assistance for the same purposes as the proposed SEP. Further, this type of SEP is allowable only when the SEP involves non-cash assistance and there are violations of EPCRA, or reporting violations under CERCLA § 103, or CAA § 112(r), or violations of other emergency planning, spill or release requirements alleged in the complaint.

8. Other Types of Projects

Projects determined by the case team to have environmental merit which do not fit within at least one of the seven categories above but that are otherwise fully consistent with all other provisions of this Policy, may be accepted with the advance approval of the Office of Enforcement and Compliance Assurance.

9. Projects Which Are Not Acceptable as SEPs

The following are examples of the types of projects that are not allowable as SEPs:

a. General public educational or public environmental awareness projects, e.g., sponsoring public seminars, conducting tours of environmental controls at a facility, promoting recycling in a community;

b. Contributions to environmental research at a college or university;

c. Conducting a project, which, though beneficial to a community, is unrelated to environmental protection, e.g., making a contribution to a non-profit, public interest, environmental, or other charitable organization, or donating playground equipment;

d. Studies or assessments without a requirement to address the problems identified in the study (except as provided for in § D.5 above);

e. Projects which the defendant/respondent will undertake, in whole or part, with low-interest federal loans, federal contracts, federal grants, or other forms of federal financial assistance or non-financial assistance (e.g., loan guarantees).

E. CALCULATION OF THE FINAL PENALTY

Substantial penalties are an important part of any settlement for legal and policy reasons. Without penalties there would be no deterrence, as regulated entities would have little incentive to comply. Additionally, penalties are necessary as a matter of fairness to those regulated entities that make the necessary expenditures to comply on time: violators should not be allowed to obtain an economic advantage over their competitors who complied.

As a general rule, the net costs to be incurred by a violator in performing a SEP may be considered as one factor in determining an appropriate settlement amount. **In settlements in which defendant/respondents commit to conduct a SEP, the final settlement penalty must equal or exceed either: a) the economic benefit of noncompliance plus 10 percent of the gravity component; or b) 25 percent of the gravity component only; whichever is greater.**

Calculating the final penalty in a settlement which includes a SEP is a five step process. Each of the five steps is explained below. The five steps are also summarized in the penalty calculation worksheet attached to this Policy.

Step 1: Settlement Amount Without a SEP

a. The applicable EPA penalty policy is used to calculate the economic benefit of noncompliance.

b. The applicable EPA penalty policy is used to calculate the gravity component of the penalty. The gravity component is all of the penalty other than the identifiable economic benefit amount, after gravity has been adjusted by all other factors in the penalty policy (e.g., audits, good faith, litigation considerations), except for the SEP.

c. The amounts in steps 1.a and b are added. This sum is the minimum amount that would be necessary to settle the case without a SEP.

Step 2: Minimum Penalty Amount With a SEP

The minimum penalty amount must equal or exceed the economic benefit of noncompliance plus 10 percent of the gravity component, or 25 percent of the gravity component only, whichever is greater. The minimum penalty amount is calculated as follows:

a. Calculate 10 percent of gravity (multiply amount in step 1.b by 0.1).
b. Add economic benefit (amount in step 1.a) to amount in step 2.a.
c. Calculate 25 percent of gravity (multiply amount in step 1.b by 0.25).
d. Identify the minimum penalty amount: the greater of step 2.c or step 2.b.[13]

Step 3. Calculate the SEP Cost

The net present after-tax cost of the SEP, hereinafter called the "SEP COST," is the maximum amount that EPA may take into consideration in determining an appropriate penalty mitigation for performance of a SEP. In order to facilitate evaluation of the SEP COST of a proposed project, the Agency has developed a computer model called PROJECT.[14] There are three types of costs that may be associated with performance of a SEP (which are entered into the PROJECT model): capital costs (e.g., equipment, buildings); one-time nondepreciable costs (e.g., removing contaminated materials, purchasing land, developing a compliance promotion

[13] Pursuant to the February 1995 Revised Interim Clean Water Act Settlement Penalty Policy, section V, a smaller minimum penalty amount may be allowed for a municipality.

[14] A copy of the PROJECT computer program software and PROJECT User's Manual may be purchased by calling that National Technology Information Service at (800) 553-6847, and asking for Document #PB 98-500408GEI, or they may be downloaded from the World Wide Web at "http://www.epa.gov/oeca/models/".

seminar); and annual operation costs and savings (e.g., labor, chemicals, water, power, raw materials).[15]

To use PROJECT, the Agency needs reliable estimates of the costs associated with a defendant/respondent's performance of a SEP, as well as any savings due to such factors as energy efficiency gains, reduced materials costs, reduced waste disposal costs, or increases in productivity. For example, if the annual expenditures in labor and materials of operating a new waste recycling process is $100,000 per year, but the new process reduces existing hazardous waste disposal expenditures by $30,000 per year, the net cost of $70,000 is entered into the PROJECT model (variable 4).

In order to run the PROJECT model properly (i.e., to produce a reasonable estimate of the net present after-tax cost of the project), the number of years that annual operation costs or savings will be expended in performing the SEP must be specified. At a minimum, the defendant/respondent must be required to implement the project for the same number of years used in the PROJECT model calculation. (For example, if the settlement agreement requires the defendant/respondent to operate the SEP equipment for two years, two years should be entered as the input for number of years of annual expense in the PROJECT model.) If certain costs or savings appear speculative, they should not be entered into the PROJECT model. The PROJECT model is the primary method to determine the SEP COST for purposes of negotiating settlements.[16]

EPA does not offer tax advice on whether a regulated entity may deduct SEP expenditures from its income taxes. If a defendant/respondent states that it will not deduct the cost of a SEP from its taxes and it is willing to commit to this in the settlement document, and provide the Agency with certification upon completion of the SEP that it has not deducted the SEP expenditures, the PROJECT model calculation should be adjusted to calculate the SEP Cost without reductions for taxes. This is a simple adjustment to the PROJECT model: just enter a zero for variable 7, the marginal tax rate. If a business is not willing to make this commitment, the marginal tax rate in variable 7 should not be set to zero; rather the default settings (or a more precise estimate of the business' marginal tax rates) should be used in variable 7.

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[15] The PROJECT calculated SEP Cost is a reasonable estimate, and not an exact after-tax calculation. PROJECT does not evaluate the potential for market benefits which may accrue with the performance of a SEP (e.g., increased sales of a product, improved corporate public image, or improved employee morale). Nor does it consider costs imposed on the government, such as the cost to the Agency for oversight of the SEP, or the burden of a lengthy negotiation with a defendant/ respondent who does not propose a SEP until late in the settlement process; such factors may be considered in determining a mitigation percentage rather than in calculating after-tax cost.

[16] See PROJECT User's Manual, January 1995. If the PROJECT model appears inappropriate to a particular fact situation, EPA Headquarters should be consulted to identify an alternative approach. For example, PROJECT does not readily calculate the cost of an accelerated compliance SEP. The cost of such a SEP is only the additional cost associated with doing the project early (ahead of the regulatory requirement) and it needs to be calculated in a slightly different manner. Please consult with the Office Of Regulatory Enforcement for directions on how to calculate the costs of such projects.

If the PROJECT model reveals that a project has a negative cost during the period of performance of the SEP, this means that it represents a positive cash flow to the defendant/respondent and is a profitable project. Such a project is generally not acceptable as a SEP. If a project generates a profit, a defendant/respondent should, and probably will, based on its own economic interests, implement the project. While EPA encourages regulated entities to undertake environmentally beneficial projects that are economically profitable, EPA does not believe violators should receive a bonus in the form of penalty mitigation to undertake such projects as part of an enforcement action. EPA does not offer subsidies to complying companies to undertake profitable environmentally beneficial projects and it would thus be inequitable and perverse to provide such subsidies only to violators. In addition, the primary goal of SEPs is to secure a favorable environmental or public health outcome which would not have occurred but for the enforcement case settlement. To allow SEP penalty mitigation for profitable projects would thwart this goal.[17]

Step 4: Determine the SEP Mitigation Percentage and then the Mitigation Amount

Step 4.a: Mitigation Percentage. After the SEP COST has been calculated, EPA should determine what percentage of that cost may be applied as mitigation against the amount EPA would settle for but for the SEP. The quality of the SEP should be examined as to whether and how effectively it achieves each of the following six factors listed below. (The factors are not listed in priority order.)

- Benefits to the Public or Environment at Large. While all SEPs benefit public health or the environment, SEPs which perform well on this factor will result in significant and quantifiable reduction in discharges of pollutants to the environment and the reduction in risk to the general public. SEPs also will perform well on this factor to the extent they result in significant and, to the extent possible, measurable progress in protecting and restoring ecosystems (including wetlands and endangered species habitats).

- Innovativeness. SEPs which perform well on this factor will further the development, implementation, or dissemination of innovative processes, technologies, or methods which more effectively: reduce the generation, release or disposal of pollutants; conserve natural resources; restore and protect ecosystems; protect endangered species; or promote compliance. This includes "technology forcing" techniques which may establish new regulatory "benchmarks."

- Environmental Justice. SEPs which perform well on this factor will mitigate damage or reduce risk to minority or low income populations which may have been disproportionately exposed to pollution or are at environmental risk.

[17] The penalty mitigation guidelines provide that the amount of mitigation should not exceed the net cost of the project. To provide penalty mitigation for profitable projects would be providing a credit in excess of net costs.

- Community Input. SEPs which perform well on this factor will have been developed taking into consideration input received from the affected community. No credit should be given for this factor if the defendant/respondent did not actively participate in soliciting and incorporating public input into the SEP.

- Multimedia Impacts. SEPs which perform well on this factor will reduce emissions to more than one medium.

- Pollution Prevention. SEPs which perform well on this factor will develop and implement pollution prevention techniques and practices.

The better the performance of the SEP under each of these factors, the higher the appropriate mitigation percentage. The percent of penalty mitigation is within EPA's discretion; there is no presumption as to the correct percentage of mitigation. **The mitigation percentage should not exceed 80 percent of the SEP COST, with two exceptions:**

(1) For small businesses, government agencies or entities, and non-profit organizations, this mitigation percentage of the SEP COST may be set as high as 100 percent if the defendant/respondent can demonstrate the project is of outstanding quality.

(2) For any defendant/respondent, if the SEP implements pollution prevention, the mitigation percentage of the SEP COST may be set as high as 100 percent if the defendant/respondent can demonstrate that the project is of outstanding quality.

If the government must allocate significant resources to monitoring and reviewing the implementation of a project, a lower mitigation percentage of the SEP COST may be appropriate.

In administrative enforcement actions in which there is a statutory limit (commonly called "caps") on the total maximum penalty that may be sought in a single action, the cash penalty obtained plus the amount of penalty mitigation credit due to the SEPs shall not exceed the limit.

Step 4.b: SEP Mitigation Amount. The SEP COST (calculated pursuant to step 3) is multiplied by the mitigation percentage (step 4.a) to obtain the SEP mitigation amount, which is the amount of the SEP cost that may be used in potentially mitigating the preliminary settlement penalty.

Step 5: Final Settlement Penalty

5.a. The SEP mitigation amount (step 4.b) is then subtracted from the settlement amount without a SEP (step 1.c).

5.b The greater of step 2.d or step 5.a is the minimum final settlement penalty allowable based on the performance of the SEP.

F. LIABILITY FOR PERFORMANCE

Defendants/respondents (or their successors in interest) are responsible and legally liable for ensuring that a SEP is completed satisfactorily. A defendant/respondent may not transfer this responsibility and liability to someone else, commonly called a third party. Of course, a defendant/respondent may use contractors or consultants to assist it in implementing a SEP.[18]

G. OVERSIGHT AND DRAFTING ENFORCEABLE SEPS

The settlement agreement should accurately and completely describe the SEP. (See related legal guideline 4 in § C above.) It should describe the specific actions to be performed by the defendant/respondent and provide for a reliable and objective means to verify that the defendant/respondent has timely completed the project. This may require the defendant/respondent to submit periodic reports to EPA. The defendant/respondent may utilize an outside auditor to verify performance, and the defendant/respondent should be made responsible for the cost of any such activities. The defendant/respondent remains responsible for the quality and timeliness of any actions performed or any reports prepared or submitted by the auditor. A final report certified by an appropriate corporate official, acceptable to EPA, and evidencing completion of the SEP and documenting SEP expenditures, should be required.

To the extent feasible, defendant/respondents should be required to quantify the benefits associated with the project and provide EPA with a report setting forth how the benefits were measured or estimated. **The defendant/respondent should agree that whenever it publicizes a SEP or the results of a SEP, it will state in a prominent manner that the project is being undertaken as part of the settlement of an enforcement action.**

The drafting of a SEP will vary depending on whether the SEP is being performed as part of an administrative or judicial enforcement action. SEPs with long implementation schedules (e.g., 18 months or longer), SEPs which require EPA review and comment on interim milestone activities, and other complex SEPs may not be appropriate in administrative enforcement actions. Specific guidance on the proper drafting of settlement documents requiring SEPs is provided in a separate document.

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[18] Non-profit organizations, such as universities and public interest groups, may function as contractors or consultants.

H. FAILURE OF A SEP AND STIPULATED PENALTIES

If a SEP is not completed satisfactorily, the defendant/respondent should be required, pursuant to the terms of the settlement document, to pay stipulated penalties for its failure. Stipulated penalty liability should be established for each of the scenarios set forth below as appropriate to the individual case.

1. Except as provided in paragraph 2 immediately below, if the SEP is not completed satisfactorily, a substantial stipulated penalty should be required. Generally, a substantial stipulated penalty is between 75 and 150 percent of the amount by which the settlement penalty was mitigated on account of the SEP.

2. If the SEP is not completed satisfactorily, but the defendant/respondent: a) made good faith and timely efforts to complete the project; and b) certifies, with supporting documentation, that at least 90 percent of the amount of money which was required to be spent was expended on the SEP, no stipulated penalty is necessary.

3. If the SEP is satisfactorily completed, but the defendant/respondent spent less than 90 percent of the amount of money required to be spent for the project, a small stipulated penalty should be required. Generally, a small stipulated penalty is between 10 and 25 percent of the amount by which the settlement penalty was mitigated on account of the SEP.

4. If the SEP is satisfactorily completed, and the defendant/respondent spent at least 90 percent of the amount of money required to be spent for the project, no stipulated penalty is necessary.

The determinations of whether the SEP has been satisfactorily completed (i.e., pursuant to the terms of the agreement) and whether the defendant/respondent has made a good faith, timely effort to implement the SEP should be reserved to the sole discretion of EPA, especially in administrative actions in which there is often no formal dispute resolution process.

I. COMMUNITY INPUT

In appropriate cases, EPA should make special efforts to seek input on project proposals from the local community that may have been adversely impacted by the violations.[19] Soliciting community input into the SEP development process can: result in SEPs that better address the needs of the impacted community; promote environmental justice; produce better community understanding of EPA enforcement; and improve relations between the community and the violating facility. Community involvement in SEPs may be most appropriate in cases where the range of possible SEPs is great and/or multiple SEPs may be negotiated.

When soliciting community input, the EPA negotiating team should follow the four guidelines set forth below.

1. Community input should be sought after EPA knows that the defendant/respondent is interested in doing a SEP and is willing to seek community input, approximately how much money may be available for doing a SEP, and that settlement of the enforcement action is likely. If these conditions are not satisfied, EPA will have very little information to provide communities regarding the scope of possible SEPs.

2. The EPA negotiating team should use both informal and formal methods to contact the local community. Informal methods may involve telephone calls to local community organizations, local churches, local elected leaders, local chambers of commerce, or other groups. Since EPA may not be able to identify all interested community groups, a public notice in a local newspaper may be appropriate

3. To ensure that communities have a meaningful opportunity to participate, the EPA negotiating team should provide information to communities about what SEPs are, the opportunities and limits of such projects, the confidential nature of settlement negotiations, and the reasonable possibilities and limitations in the current enforcement action. This can be done by holding a public meeting, usually in the evening, at a local school or facility. The EPA negotiating team may wish to use community outreach experts at EPA or the Department of Justice in conducting this meeting. Sometimes the defendant/respondent may play an active role at this meeting and have its own experts assist in the process.

4. After the initial public meeting, the extent of community input and participation in the SEP development process will have to be determined. The amount of input and participation is likely to vary with each case. Except in extraordinary circumstances and with agreement of the parties, representatives of community groups will not participate directly in the settlement negotiations. This restriction is necessary because of the

[19] In civil judicial cases, the Department of Justice already seeks public comment on lodged consent decrees through a Federal Register notice. See 28 CFR §50.7. In certain administrative enforcement actions, there are also public notice requirements that are followed before a settlement is finalized. See 40 CFR Part 22.

confidential nature of settlement negotiations and because there is often no equitable process to determine which community group should directly participate in the negotiations.

J. EPA PROCEDURES

1. Approvals

The authority of a government official to approve a SEP is included in the official's authority to settle an enforcement case and thus, subject to the exceptions set forth here, no special approvals are required. The special approvals apply to both administrative and judicial enforcement actions as follows:

a. Regions in which a SEP is proposed for implementation shall be given the opportunity to review and comment on the proposed SEP.

b. In all cases in which a project may not fully comply with the provisions of this Policy (e.g., see footnote 1), the SEP must be approved by the EPA Assistant Administrator for Enforcement and Compliance Assurance. If a project does not fully comply with all of the legal guidelines in this Policy, the request for approval must set forth a legal analysis supporting the conclusion that the project is within EPA's legal authority and is not otherwise inconsistent with law.

c. In all cases in which a SEP would involve activities outside the United States, the SEP must be approved in advance by the Assistant Administrator and, for judicial cases only, the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice.

d. In all cases in which an environmental compliance promotion project (section D.6) or a project in the "other" category (section D.8) is contemplated, the project must be approved in advance by the appropriate office in OECA, unless otherwise delegated.

2. Documentation and Confidentiality

In each case in which a SEP is included as part of a settlement, an explanation of the SEP with supporting materials (including the PROJECT model printout, where applicable) must be included as part of the case file. The explanation of the SEP should explain how the five steps set forth in Section A.3 above have been used to evaluate the project and include a description of the expected benefits associated with the SEP. The explanation must include a description by the enforcement attorney of how nexus and the other legal guidelines are satisfied.

Documentation and explanations of a particular SEP may constitute confidential settlement information that is exempt from disclosure under the Freedom of Information Act, is

outside the scope of discovery, and is protected by various privileges, including the attorney-client privilege and the attorney work-product privilege. While individual Agency evaluations of proposed SEPs are confidential, privileged documents, this Policy is a public document and may be released to anyone upon request.

This Policy is primarily for the use of U.S. EPA enforcement personnel in settling cases. EPA reserves the right to change this Policy at any time, without prior notice, or to act at variance to this Policy. This Policy does not create any rights, duties, or obligations, implied or otherwise, in any third parties.

ATTACHMENT

SEP PENALTY CALCULATION WORKSHEET

This worksheet should be used pursuant to section E of the Policy.
Specific Applications of this Worksheet in a Case Are Privileged, Confidential Documents.

STEP		AMOUNT
STEP 1: CALCULATION OF SETTLEMENT AMOUNT WITHOUT A SEP.		
1.a.	BENEFIT: The applicable penalty policy is used to calculate the economic benefit of noncompliance.	$
1.b.	GRAVITY: The applicable penalty policy is used to calculate the gravity component of the penalty; this is gravity after all adjustments in the applicable policy.	$
1.c	SETTLEMENT AMOUNT without a SEP: Sum of step 1.a plus 1.b.	$
STEP 2: CALCULATION OF THE MINIMUM PENALTY AMOUNT WITH A SEP		
2.a	10% of GRAVITY: Multiply amount in step 1.b by 0.10	$
2.b	BENEFIT PLUS 10% of GRAVITY: Sum of step 1.a plus step 2.a.	$
2.c.	25 % of GRAVITY: Multiply amount in step 1.b by 0.25.	$
2.d	MINIMUM PENALTY AMOUNT: Select greater of step 2.c or step 2.b.	$
STEP 3: CALCULATION OF THE SEP COST USING PROJECT MODEL.		$
STEP 4: CALCULATION OF MITIGATION PERCENTAGE AND MITIGATION AMOUNT.		
4.a.	SEP Cost Mitigation Percentage. Evaluate the project pursuant to the 6 mitigation factors in the Policy. Mitigation percentage should not exceed 80 % unless one of the exceptions applies.	%
4.b.	SEP Mitigation Amount. Multiply step 3 by step 4.a	$
STEP 5: CALCULATION OF THE FINAL SETTLEMENT PENALTY.		
5.a	Subtract step 4.b from step 1.c	$
5.b.	**Final Settlement Penalty**: Select greater of step 2.d or step 5.a.	$

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing CATALINA REPLY TO EPA'S NOTICE OF APPEAL in the matter of Catalina Yachts, Inc., EPCRA Appeal No. 98-(2), were sent to the following persons in the manner indicated:

Original and Five Copies
Sent Via Federal Express to:

United States Environmental Protection Agency
Environmental Appeals Board
USEPA Weststory Building
607 14th Street, N.W., 5th Floor
Washington, DC 20005

and One Copy by U.S. Mail to:

David M. Jones, Esq.
Office of Regional Counsel, RC-2-1
United States Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Date: April 23, 1998

Helen Abraham